Congressional Research Service

MEMORANDUM July 16, 2012

From: Kathleen S. Swendiman
Legislative Attorney
Ext. 7-9105

Evelyne P. Baumrucker
Analyst in Health Care Financing
Ext. 7-8913

Subject: **Selected Issues Related to the Effect of *NFIB v. Sebelius* on the Medicaid Expansion Requirements in Section 2001 of the Affordable Care Act**

This memorandum has been prepared for distribution to more than one congressional office.

This memorandum provides an analysis of the effect of the Supreme Court's decision in *National Federation of Independent Business v. Sebelius* on the Medicaid expansion in the Affordable Care Act (ACA). First, we provide a summary of the Court's decision regarding the constitutionality of the ACA Medicaid expansion. Then, using the framework of the Court's decision, which limited the ability of the federal government to withhold all federal Medicaid matching funds unless states comply with the ACA Medicaid expansion requirements, we address selected questions regarding implementation of the Medicaid expansion provision.

The Supreme Court's Holding in *NFIB v. Sebelius* on the Medicaid Expansion Issue

On June 28, 2012, the United States Supreme Court, in *National Federation of Independent Business v. Sebelius (NFIB)*,[1] a case brought by 26 states and the National Federation of Independent Business, issued a highly anticipated decision largely affirming the constitutionality of the Affordable Care Act (ACA).[2] In a complex, fractured opinion, the Supreme Court upheld the 2014 ACA Medicaid expansion, but limited the ability of the federal government to withhold all federal Medicaid funding unless the states accept and comply with the ACA Medicaid expansion requirements.

[1] No. 11-393, slip opinion (U.S. June 28, 2012), available at http://www.supremecourt.gov/opinions/11pdf/11-393c3a2.pdf. The Court also upheld a requirement, beginning in 2014, that most individuals carry health insurance or pay a penalty for noncompliance as a valid exercise of Congress' authority to levy taxes.

[2] The Patient Protection and Affordable Care Act, P.L. 111-148, as amended by the Health Care and Education Reconciliation Act of 2010, P.L. 111-152.

The new expansion requirements, set forth in Section 2001 of Title II of ACA, provide that, beginning on January 1, 2014, nonelderly, non-pregnant individuals under the age of 65 with income below 133 percent of the federal poverty level (FPL) will be made newly eligible for Medicaid.[3] The Supreme Court found that compelling the states to participate in the ACA Medicaid expansion, which the Chief Justice found to be essentially a "new program," or else face the possible loss of all federal funds under the current Medicaid program, was coercive and unconstitutional under the Spending Clause of the United States Constitution and the Tenth Amendment.[4] "Congress may use its spending power to create incentives for states to act in accordance with federal policies. But when 'pressure turns into compulsion,'. . . the legislation runs contrary to our system of federalism."[5] The remedy for this unconstitutional violation was to limit enforcement of the ACA Medicaid expansion requirements to only withholding the federal matching funds offered for "newly eligible" individuals in the ACA Medicaid expansion.[6]

Divided and Complicated Decision

Three justices, Chief Justice Roberts and Justices Breyer and Kagan, would have held that the Medicaid expansion requirements are constitutional, but that the Constitution is violated by the threat to the states of the loss of existing federal Medicaid funding if they decline to comply with the ACA expansion. Two Justices, Justices Ginsburg and Sotomayor, would have held that the ACA Medicaid expansion is constitutional in its entirety. Four dissenting Justices, Justices Scalia, Kennedy, Thomas, and Alito would have struck down the entire ACA expansion program. In the end, the dissenting Justices agreed with Chief Justice Roberts' plurality that the threat to withhold all ACA Medicaid program funds from non-compliant states was unconstitutionally coercive, providing a majority of seven Justices on that point.[7] In an interesting twist, a different majority of five Justices agreed to the Chief Justice's remedy to strike down only the provision withholding all ACA Medicaid federal matching funds for non-compliance with the ACA expansion provision.[8]

In addition, only Justices Breyer and Kagan were on board with Justice Roberts' "new program – old program" analysis. Justices Ginsburg and Sotomayor only agreed to the remedy; otherwise they would have upheld the new conditions. The fractured nature of this decision, with its three opinions, adds to the complexity of determining its effect on future grant conditions, and on implementation of the ACA Medicaid expansion.

---

[3] Section 2001(a)(1)(C) of ACA, 42 U.S.C. §1396a(a)(10)(i)(VIII). From 2014 to 2016, the federal government will cover 100 percent of the Medicaid costs of these newly eligible individuals, with the percentage dropping to 90 percent, and the states covering the difference, by 2020.

[4] U.S. CONST., Art. I, §8, cl.1.

[5] NFIB at 47.

[6] "Newly eligible" individuals are defined as nonelderly, non-pregnant individuals with family income below 133 percent of FPL who (1) are not under the age of 19 (or such other age as the state may have elected), and (2) are not eligible under a state plan (or waiver) for full Medicaid state plan benefits or for Medicaid benchmark or benchmark-equivalent coverage, or are eligible but not enrolled (or are on a waiting list) in such coverage as of December 1, 2009. Section 2001(a)(3) of ACA, as amended, 42 U.S.C. §1396d(y)(2)(A). For more information on the Medicaid and CHIP provisions in ACA, see CRS Report R41210, *Medicaid and the State Children's Health Insurance Program (CHIP) Provisions in ACA: Summary and Timeline*, by Evelyne P. Baumrucker et al.

[7] Justices Scalia, Kennedy, Thomas, Alito, Breyer, Kagan, and Chief Justice Roberts. In an unusual move, the four Justices who would have struck down the entire expansion program agreed with the Chief Justice that conditioning the continued receipt of federal Medicaid funding on states' compliance with the Medicaid expansion was coercive, and thus unconstitutional, but did not join the majority opinion. Only Justices Breyer and Kagan joined Chief Justice Roberts' controlling opinion.

[8] Justices Ginsburg and Sotomayor joined with the Chief Justice and Justices Breyer and Kagan regarding the remedy.

In the portion of Chief Justice Robert's opinion joined by Justices Breyer and Kagan, the Chief Justice opined that the Affordable Care Act's Medicaid expansion went too far for two reasons. First, the changes in the health care law were so broad that they essentially created a different program from the one the states originally signed up for, a mandate that the Chief Justice found to be so significant that a state could not have anticipated that Congress' reserved right to "alter" or "amend" the Medicaid program would include such drastic changes.[9] Second, the requirement that states either go along with the changes or possibly lose all their federal Medicaid dollars, which account for about 10 percent of state budgets, doesn't give the states a real choice about whether or not to participate. "In this case the financial 'inducement' Congress has chosen . . . is a gun to the head," Chief Justice Roberts wrote.[10]

In other words, Congress acted constitutionally in offering states ACA federal funds to expand Medicaid to the new coverage group. If a state decides to accept the new ACA Medicaid expansion funds, it must abide by the ACA expansion coverage rules. However, if a state chooses not to participate in the ACA expansion it cannot lose all of its federal matching funds under the current Medicaid program. The states must have a "genuine choice" to accept or reject the new ACA expansion funds and requirements that come with those funds.[11] While Justice Roberts' opinion is technically the majority opinion only with regard to the Court's remedy, his views are likely to guide the lower courts in the future for new spending power challenges to federal grant conditions.

Limited Remedy Fashioned by the Court

The Supreme Court fashioned a very limited remedy for the unconstitutional threat of the loss of all federal Medicaid funds as a condition of implementing the 2014 Medicaid expansion requirements: only federal funds offered to finance medical assistance for the new adult coverage group may be withheld if the states choose not to expand their Medicaid programs to include this new population.[12] As a corollary, if a state accepts the new ACA federal funds to expand its coverage to this new group, and the state becomes non-compliant with any conditions applicable to the ACA expansion group, again, only ACA Medicaid federal funds may be withheld because they are the only funds tied to this "new grant program."[13] The Court's decision only limited this new grant program's *enforcement* mechanism; it did not specifically affect, change or limit any other Medicaid or ACA provisions. This distinction will be important going forward.

Severability Analysis

Chief Justice Roberts' brief severability analysis reinforces the point that all Medicaid provisions, including pre-ACA and ACA amendments, remain fully intact and operative. First, he stated that the provision which gives the Secretary of HHS general authority to withhold all "further [Medicaid] payments...to the State"[14]if she determines the state is out of compliance with any Medicaid requirement, continues to be valid *except* as applied to the ACA Medicaid expansion program.[15] Then, the Court found

[9] Section 1104 of the Social Security Act, 42 U.S.C. §1304, states that "[t]he right to alter, amend, or repeal any provision of this Act is hereby reserved to the Congress."

[10] NFIB at 51.

[11] *Id.* at 57.

[12] *Id.* at 55.

[13] *Id.* at 56.

[14] Section 1904 of the Social Security Act, 42 U.S.C. §1396c.

[15] That application was "severed" under a general severability provision, present in the original 1935 Social Security Act, which (continued...)

that, even without a specific severability provision in ACA, Congress intended the rest of ACA to remain intact even if withholding all federal funds if states do not cover the new adult population in 2014 is unconstitutional. Chief Justice Roberts said the Court was "confident" that "Congress would have wanted the rest of the Act to stand, had it known that States would have a genuine choice whether to participate in the new Medicaid expansion."[16]

This means that if a state declines to expand its Medicaid program to cover the new expansion group, the "new program," the state will forgo only the federal funds (initially 100 percent federal matching payment rate) that would have paid for medical assistance for "newly eligible" individuals in that group. However, all other provisions of the Medicaid statute, both current and in ACA, are "severed" from this remedy, and so remain "fully operative" as provided in law, and should "function in a way consistent with Congress' basic objectives in enacting the statute."[17] New program or not, if a state participates in the ACA Medicaid expansion, that part of its program should essentially look the same as it would have before this Supreme Court decision.[18]

Issues Related to States' "Genuine Choice" Regarding ACA Medicaid Expansion

As noted above, only three Justices joined with Chief Justice Roberts for his "new program" analysis. Nevertheless, this analysis is important for questions about Medicaid provisions in ACA that have some relation to, or effect upon, the ACA Medicaid expansion, but which arguably are not part of the expansion itself.

Medicaid Expansion as a "New Program"

As discussed above, a majority of the Justices agreed that Congress cannot compel states to expand Medicaid by threatening to withhold all federal money under the current Medicaid program. In the words of the Chief Justice, "[t]he threatened loss of over 10 percent of a State's overall budget, in contrast, is economic dragooning that leaves the states with no real option but to acquiesce in the Medicaid expansion."[19]

The Chief Justice, in his opinion, reached this conclusion in part by viewing the current Medicaid program as distinct from the ACA Medicaid expansion, which he found to be a "new program" under ACA. However, the Chief Justice did not state as precisely as some might wish what the ACA Medicaid expansion includes and does not include. A good argument may be made that his opinion, taken as a whole, provides sufficient guidance to determine what he meant by the term "Medicaid expansion" for purposes of his "new program" constitutional analysis under the Spending Clause. At the beginning of

(...continued)

states "If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby." Section 1103 of the Social Security Act, 42 U.S.C. §1303.

[16] NFIB at 57.

[17] *Id.* at 58.

[18] This assumes Congress does not make any legislative changes to current law, and the Secretary does not invoke any of her discretionary authorities, such as waiver authorities, to make allowable changes in how a state complies with the statute.

[19] NFIB at 52.

this part of his opinion, he cites Section 2001(a)(1) of ACA[20] which defines the new category of coverage under the Medicaid expansion as "all individuals under the age of 65 with incomes below 133% of the federal poverty line."[21] The Chief Justice goes on to contrast this "expansion in coverage mandated by the Act" with the current Medicaid program, noting that "the manner in which the expansion is structured indicates that while Congress may have styled the ACA expansion a mere alteration of existing Medicaid, it recognized it was enlisting the States in a new health care program."[22] This "structure" included "a separate funding provision to cover the costs of providing services to any person made newly eligible by the expansion,"[23] and the different benefits package for this new group*, i.e.,* "a level of coverage that is less comprehensive than the traditional Medicaid benefit package."[24] It seems clear that the ACA Medicaid expansion, which the Chief Justice determines to be a "new program," is the extension of Medicaid coverage to the new ACA 133 percent expansion group for which the federal government will provide enhanced federal matching funds beginning January 1, 2014.

Having determined that the ACA Medicaid expansion and the current Medicaid programs are separate and distinct programs, the Chief Justice ruled that conditioning continued receipt of all federal Medicaid funds on agreeing to the new policy changes to Medicaid that would result from the ACA Medicaid expansion was unconstitutionally coercive: "When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes."[25]

Maintenance of Effort (MOE) and Modified Adjusted Gross Income (MAGI) Provisions

Following the Supreme Court's decision in *NFIB*, some have argued that the states are no longer required to comply with the ACA maintenance of effort provision (MOE), and the modified adjusted gross income provision (MAGI) because these requirements should be considered part of the ACA Medicaid expansion which the Court determined was a "new program." The states have a choice whether or not to accept the Medicaid expansion funds, so if these provisions are part of that "new program," these requirements would be voluntary. A careful reading of the Court's holding supports the conclusion that these two provisions are unaffected by the Supreme Court's ruling, and are enforceable under the current Medicaid statute.

Section 2001(b) of ACA , entitled "Maintenance of Medicaid Income Eligibility," amends Section 1902(a) of the Social Security Act,[26] to provide that states with Medicaid programs in effect on March 23, 2010, the date of enactment of the Affordable Care Act, must maintain their programs with the same eligibility standards, methodologies, and procedures until the Secretary of HHS determines that the state's insurance exchange is operational. The Medicaid and State Children's Health Insurance Program (CHIP) MOE for children up to age 19 continues until September 30, 2019. Failure to comply with the MOE requirements means a state risks losing all of its federal Medicaid matching funds. The MOE provision does not prohibit states from cutting Medicaid in other ways, such as by reducing provider reimbursement

[20] 42 U.S.C. §1396a(a)(10)(A)(i)(VIII).

[21] *Id.* at 45.

[22] NFIB at 54.

[23] *Id.* at 54.

[24] *Id.*

[25] NFIB at 50.

[26] 42 U.S.C. §1396a.

rates or by eliminating optional benefits. Neither are states prohibited from expanding Medicaid coverage during the MOE period.[27]

The Supreme Court in *NFIB* gave no indication it considered this provision to be part of the "new Medicaid expansion program" for which the states must have a "genuine choice." Arguably, the MOE provision is not part of the "new program" because it is not a requirement that is attached to the new ACA expansion funds that a state has a choice to accept, or not; it is a requirement, already in effect, pertaining to a state's current Medicaid population, attached to current Medicaid funds, not future ACA expansion funds. While one may argue that the MOE requirement is related to the Medicaid expansion, it would be difficult to view this requirement as an integral part of the ACA expansion program itself, particularly since the MOE requirement is linked to the date the state's insurance exchange becomes fully operational, which is not necessarily the same date as the ACA Medicaid expansion begins.[28]

The Supreme Court's decision does not make changes to the current Medicaid program. This point was made clear in the Court's severability analysis when it said that "Congress would have wanted the rest of the Act to stand, had it known that States would have a genuine choice whether to participate in the new ACA Medicaid expansion."[29] This supports the interpretation that the MOE requirement and its enforcement by the potential loss of all current federal Medicaid matching funds "stands," remaining untouched by the Court's ruling.[30]

On July 10, 2012, the Secretary of Health and Human Services, Kathleen Sebelius, sent a letter to the nation's governors indicating that while the Supreme Court limited enforcement of the states' rejection of the ACA Medicaid expansion provisions, the Court did not change any other ACA or Medicaid provisions. "The Supreme Court held that, if a state chooses not to participate in this expansion of Medicaid eligibility for low-income adults, the state may not, as a consequence, lose federal funding for its existing Medicaid program. The Court's decision did not affect other provisions of the law."[31]

A similar line of reasoning applies to the MAGI provision. Section 2002 of ACA, entitled "Income Eligibility for Nonelderly Determined Using Modified Gross Income," amends Section 1902(e) of the Social Security Act[32] to provide that, starting January 1, 2014, eligibility for Medicaid for most

---

[27] Section 2001(b)(3) of ACA provides for an exemption to this MOE requirement for states that have, or are projected to have, a budget deficit, but only for non-pregnant, non-disabled adults who are eligible for medical assistance under a state plan or waiver of a state plan, and whose income exceeds 133 percent of the federal poverty level. For more information on the ACA MOE provision, see CRS Report R41835, *Medicaid and CHIP Maintenance of Effort (MOE): Requirements and Responses*, by Evelyne P. Baumrucker.

[28] Section 2001(b)(1) of ACA.

[29] NFIB at 57. Justice Roberts' opinion does not take specific note of the many other provisions in ACA that either make structural changes to the Medicaid program or are related in some way to the Medicaid expansion coverage group. This may not be surprising since the Chief Justice made it clear that the Court's limitation on "coercing" a state into covering the new Medicaid expansion population did not affect any other provisions of Medicaid or ACA.

[30] A completely different analysis would be required if the MOE provision were challenged as an unconstitutional condition under the precedent of *NFIB.* The narrow holding of *NFIB* suggests this provision might be found constitutional by the courts, particularly since states are required to maintain their current Medicaid programs, not expand them, and, arguably, the MOE requirement does not accomplish a "transformation" of the Medicaid program that states could not have anticipated. *See* CRS Report WSLG117, *Conditioning Federal Grants after NFIB v. Sebelius: Carrots, Sticks, and New Programs*, by Kathleen S. Swendiman.

[31] *See* Letter from Kathleen Sebelius, Secretary, Department of Health and Human Services, to Governors (July 10, 2012), available at http://capsules.kaiserhealthnews.org/wp-content/uploads/2012/07/Secretary-Sebelius-Letter-to-the-Governors-071012.pdf.

[32] 42 U.S.C. §1396a(e).

individuals, as well as for CHIP, will be determined using methodologies that are based on modified adjusted gross income as defined in the Internal Revenue Code. Eligibility for advance payments of premium tax credits for the purchase of private insurance coverage through state insurance exchanges will also be based on MAGI.[33]

Following the Supreme Court's decision in *NFIB*, if states choose to participate in the ACA Medicaid expansion, it appears they will have to comply with all conditions that come with that choice, including compliance with MAGI standards for determining income eligibility for the ACA expansion population, as well as certain other existing Medicaid eligibility categories.[34] If a participating state does not comply with MAGI standards for the ACA expansion population, ACA expansion funds could be withheld. As Justice Roberts stated in *NFIB*, "Nor does [this holding] affect the Secretary's ability to withdraw funds provided under the Affordable Care Act if a State that has chosen to participate in the ACA expansion fails to comply with the requirements of that Act."[35]

If states choose not to participate in the Medicaid expansion, given the Court's severability analysis, the MAGI standards would still be applicable to other parts of the state's Medicaid program, CHIP program and for determining an individual's eligibility for federal subsidies toward the purchase of private health coverage through the state exchanges. As discussed above, all Medicaid and ACA provisions are "severed" from the remedy the Court fashioned to address the unconstitutional threat of the loss of all federal Medicaid funds if the states do not accept the ACA expansion funds and attached conditions.

Issues Related to ACA Medicaid Expansion Program Going Forward

The Supreme Court upheld ACA's Medicaid expansion provisions, limiting only the possible remedy for states that forgo accepting the new expansion funds and the requirements that come with those funds. "The Court today limits the financial pressure the Secretary may apply to induce the States to accept the terms of the ACA Medicaid expansion. As a practical matter, that means States may now choose to reject the expansion; that is the whole point."[36] The Court did not address any of a number of practical issues that may arise going forward.

States' Ability to Opt In or Out of the Medicaid Expansion

The states now have a "genuine choice whether to participate in the new ACA Medicaid expansion."[37] The Secretary cannot penalize states that refuse to comply with the expansion requirements by taking away their existing federal Medicaid funding, so a state may continue its Medicaid program without

[33] Section 2002(a) of ACA, 42 U.S.C. §1396a(e)(a). CMS regulations, effective in 2014, apply the MAGI methodology and related eligibility streamlining requirements to all populations that are not MAGI-exempt, including children, parents, adults, and pregnant women. *See* Medicaid Eligibility Final Rule at http://www.gpo.gov/fdsys/pkg/FR-2012-03-23/html/2012-6560.htm.

[34] CMS is currently seeking input on whether states should adopt one methodology for converting existing Medicaid and CHIP income eligibility standards into equivalent MAGI standards under ACA, or if states should be able to choose from two or more alternatives with CMS approval, according to a notice the agency released June 21, 2012, available at http://www.medicaid.gov/State-Resource-Center/Events-and-Announcements/Downloads/MAGI-income-conversion.pdf.

[35] NFIB at 56.

[36] *Id.* at 57.

[37] *Id.*

expanding its coverage to the ACA expansion group without any federal financial penalty.[38] The initial choice to opt in or opt out is clear under the Court's ruling in *NFIB*.

However, the Court did not address such matters as whether a state that chooses to expand its Medicaid coverage may later decide to "opt out" of that choice and of the expansion requirements; and, whether, now that a state has a "choice," it must exercise that choice by January 1, 2014, or opt in later if it wishes. First and foremost, these practical ramifications of the Court's ruling in *NFIB,* will need to be addressed by the Secretary of HHS, who has overall authority to implement the provisions of the Affordable Care Act, taking into consideration the Supreme Court's decision.

While the Court's holding did not specifically address these and other issues, one may find guidance in the Court's opinion for the question whether a state that chooses to "opt in" to the ACA Medicaid expansion may, at a later time, choose to "opt out." If a state stops providing medical services to the ACA Medicaid expansion population, it would no longer be in compliance with the conditions for receiving the new expansion funds, and those funds could be withheld or terminated by the Secretary. The Chief Justice stated that the Court's holding does not "affect the Secretary's ability to withdraw funds provided under the Affordable Care Act if a State that has chosen to participate in the ACA expansion fails to comply with the requirements of that Act."[39] It would appear that, under *NFIB,* the Secretary could not also withhold federal matching funds under the rest of a state's Medicaid program. Conceivably, then, a state may leave or "opt out" of the ACA Medicaid expansion by refusing the expansion funds, without also losing federal funds under the rest of a state's Medicaid program.

In general, states always have the ability to end their participation in federal grant programs by refusing the federal funds offered, thus ending their obligation to comply with the conditions attached to those federal funds. What is unique in this case is the fact that the Chief Justice, for purposes of deciding a constitutional issue, essentially separated the ACA Medicaid expansion from the current Medicaid program for enforcement purposes. As noted above, only a plurality of Justices agreed to this "new program" analysis, so it remains to be seen how much it will be used, or how far it will go, in future court decisions. However, there was a majority on board for the actual remedy to limit the Secretary's enforcement of the Medicaid expansion program requirements, and the Court's opinion set out clear parameters for application of that remedy.

In addition, the Secretary might take the position that, while the states have a choice whether to participate in the ACA expansion or not, compliance must begin January 1, 2014, as stated in the statute, and opting in at a later time is not an option. On the other hand, if a state does not participate in the ACA expansion by that date, and later amends its state plan to meet the ACA Medicaid expansion requirements, a state might argue that the Secretary must approve the state plan amendment at that time. In other words, does the language "beginning January 1, 2014" mean the state's choice must be made by that date, or that the new Medicaid expansion requirements begin on that date, and when the state chooses to amend its state plan to meet those requirements it is eligible for the federal funding? As the Chief Justice said, "[i]t is fair to say that Congress assumed that every State would participate in the ACA Medicaid expansion, given that States had no real choice but to do so."[40] These new questions arise because of the interaction

[38] Other expansion requirements, such as the required expansion of Medicaid eligibility for children ages 6-18 in Section 2001(a)(5)(B) of ACA, are still in effect after *NFIB*. This provision is distinct from the provision extending Medicaid eligibility to certain other adult groups in Section 2001(a)(1), initially funded at a 100 percent federal matching rate, which was the focus of the court's majority opinion.

[39] *Id.* at 56.

[40] NFIB at 57.

of the Supreme Court's decision with a provision Congress thought was simply a modification to the existing Medicaid program, not a "new program."

Authority of Secretary to Make Changes to the Medicaid Expansion Program

In general, whatever authorities the Secretary has under the Medicaid statute and other statutes, such as waiver authorities, are unaffected by the Court's decision in *NFIB*. The Secretary's broad authority under such provisions as "Section 1115"[41] continues and may be used by the Secretary in accordance with the authorizing statute and her discretion. It may be expected that the Secretary might use her administrative authority and possibly also waiver authorities to provide flexibility and appropriate guidance for implementing the Affordable Care Act in view of the Court's decision. Federal agencies have considerable discretion to interpret the authorizing statutes of federal programs directed to them for implementation. In appropriate cases, the courts will defer to a federal agency's interpretation of an authorizing statute, unless the interpretation is "arbitrary, capricious or manifestly contrary to the statute."[42] In the wake of the Supreme Court's decision in *NFIB*, the Secretary retains considerable discretion to interpret the Affordable Care Act.

For example, the Affordable Care Act includes a deadline for a state to decide whether or not to establish a state insurance exchange, but the law didn't contemplate states being allowed to opt out of the ACA Medicaid expansion without also opting out of their entire Medicaid program, so there is no deadline in the statute for that decision. The Secretary may provide guidance which might include "practical" deadlines, taking into consideration state legislative processes which may need to be involved in the decision to participate or not, and the time needed to meet the 2014 deadline if a state chooses to participate in the expansion.

It is unclear at this point whether states might be able to expand the new ACA expansion partially, for example only up to 100 percent of FPL.[43] On this point, it is noted that the Supreme Court's severability analysis clearly states that the Court's ruling does not change any Affordable Care Act provisions including those that describe the coverage group, funding levels, or timing for the ACA's Medicaid expansion. As currently written, those provisions appear to be mandatory; they do not, by their terms, contemplate a phased-in approach to expansion of the newly eligible population. Presumably, in exchange for the 100 percent matching rate, Congress wanted the entire ACA expansion group covered as of 2014. The statute provides: "A State plan for medical assistance ***must*** . . . **provide** . . . for making medical assistance available . . . to . . . ***all individuals*** . . . who are under 65 years of age, not pregnant, not entitled to, or enrolled for, benefits . . ., and whose income . . . does not exceed 133% of the poverty line." (emphasis added). Since the statute is very specific that "all individuals" meeting the statutory qualifications must be covered, it may be argued that coverage is an all-or-nothing proposition for the states.

Whether the Secretary might be able to use her waiver authority to provide some flexibility on this issue if a state does not opt into the Medicaid expansion, such as allowing a state to expand Medicaid coverage to adults only up to 100 percent of FPL, is an open question, and some possible legal and administrative

[41] 42 U.S.C. §1315(a)(1).

[42] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." Morton v. Ruiz, 415 U.S. 199, 231 (1974).

[43] These options might appeal to some states as a way to reduce the ACA expansion population for whom the state will eventually have partial financial obligations, and perhaps to avoid current or future state budget constraints.

issues come to mind that would have to be addressed. The Secretary may, under her Section 1115 demonstration authority, waive the requirements of specific sections of Social Security Act programs, including the Medicaid state plan requirements in Section 1902 of the Social Security Act,[44] for any "experimental, pilot or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of title… XIX of this chapter… in a state or states."[45] The Secretary may waive the specified provisions "to the extent and for the period he finds necessary to enable such State or States to carry out such project." The Secretary may also use the Section 1115 waiver authority to pay for costs that are not otherwise matchable under Section 1903 of the Social Security Act.

Since the requirement that a state cover all individuals up to 133 percent of FPL is in Section 1902, that requirement is theoretically waivable, so long as the resulting demonstration project "is likely to assist in promoting the objectives" of the Medicaid program. However, it is not clear that a waiver for a partial Medicaid expansion could include continued access to the enhanced federal matching rate.[46] Section 1115(a)(2) stipulates that expenditures under a waiver are eligible for federal matching under Section 1903 of the Social Security Act, which describes the conditions under which federal financial participation is available. However, the enhanced payment rate is in a different provision, Section 1905.[47] In addition, longstanding administrative guidance that requires waiver costs to be budget neutral to the federal government over the life of the waiver program would need to be considered.[48]

Conclusion

The Supreme Court's decision in *NFIB v. Sebelius* marks the first time the High Court has struck down conditions on federal grants to states that it determined "cross the line from enticement to coercion."[49] In a divided and complex decision, the Court held that Congress cannot threaten the states with the loss of all federal Medicaid funding if the states decline to expand Medicaid coverage as mandated by the Affordable Care Act. For purposes of the ACA Medicaid expansion program going forward, the most important aspect of the Court's holding beyond its limitation on the Secretary's ability to withhold all federal Medicaid matching funds if a state does not participate in the ACA expansion, is that the Court left all the other provisions of ACA intact and fully operative. While this aspect of the Court's ruling helps to clarify some issues regarding implementation of the ACA Medicaid expansion by the states, other complex legal and practical questions are not easily addressed this early on.

When drafting the Affordable Care Act, Congress did not envision that states would have a choice to refuse the ACA Medicaid expansion requirements without opting out of the entire Medicaid program. Consequently, the Administration is faced with unanticipated implementation challenges and unforeseen consequences stemming from the Court's ruling less than three weeks ago. It is expected that the Secretary will use her statutory and administrative authorities to provide appropriate flexibility and interpretive guidance for implementing the Affordable Care Act in view of the Court's decision. Congress,

---

[44] 42 U.S.C. §1396a.

[45] Section 1115(a) of the Social Security Act, 42 U.S.C. §1315(a).

[46] States may view coverage up to 100 percent FPL as critical since premium credits are only available for those individuals whose MAGI is at or above 100 percent FPL up to 400 percent FPL. Section 1401 of ACA, as amended, 26 U.S.C. §36B(c).

[47] 42 U.S.C. §1396d(y).

[48] Medicaid Program, "Demonstration Proposals Pursuant to Section 1115(a) of the Social Security Act Policies and Procedures," 59 Fed. Reg. 49249 (September 27, 1994).

[49] *NFIB* at 58.

also, may decide to direct implementation or change current statutory provisions through the legislative and appropriations process.