

9th Circ. Closes More Doors On ACA Challenges

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On Sept. 2, 2014, in the case of *Coons v. Lew*, 762 F.3d 891 (9th Cir. 2014), the Ninth Circuit provided the Obama administration with a significant victory by rejecting on the merits challenges to the Affordable Care Act's so-called individual mandate based on Arizona state law and the right to medical autonomy. In so holding, the court signaled to ACA detractors that the door is closing, or may be already closed, to these avenues of attack on the individual mandate.

At the same time, the court dismissed as unripe challenges to the individual mandate based on the individual right to privacy, and challenges to the ACA's Independent Payment Advisory Board based on constitutional nondelegation principles. Though the Ninth Circuit did not comment on the merits of these arguments, its dismissal on jurisdictional, rather than merits, grounds leaves an open door for challenges to the ACA based on these arguments in the future.



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Doors Closing: State Law and Medical Autonomy Challenges to the ACA's Individual Mandate

The individual mandate, which lies at the heart of the ACA, requires that individuals maintain a minimum level of health insurance coverage or pay a penalty.

In *Coons v. Lew*, Nick Coons, an uninsured Arizonan who did not want to purchase health insurance, brought two facial challenges to the individual mandate that the Ninth Circuit rejected outright. First, Coons claimed that a newly enacted Arizona law, the Health Care Freedom Act, enabled him to evade the individual mandate. The Health Care Freedom Act, which was added to the Arizona Constitution by voters in 2010, states that no law can "compel, directly or indirectly, any person, employer or health care provider to participate in any health care system." It further provides that "a person ... shall not be required to pay penalties or fines for paying directly for lawful health care services." This law, if allowed to stand, could have effectively nullified the ACA's individual mandate for Arizonans. Similar laws have been passed in other states, including Kansas, New Hampshire, North Dakota, Tennessee and Virginia.

The Ninth Circuit considered and rejected Coons' state law argument, holding in a strongly worded decision that the ACA presents a "classic case of preemption by implication." As the panel explained, "[t]he Arizona Act provides that its citizens may forego minimum health insurance coverage and abstain

from paying any penalties, ... which is exactly what the individual mandate requires. The Arizona Act thereby stands as an obstacle to Congress' objective to expand minimum essential health coverage nationwide through the individual mandate, ... and is therefore rejected." This ruling strongly suggests that challenges to the individual mandate based on similar laws in other states are also likely to fail.

Second, Coons asserted that the individual mandate infringed on his substantive due process right to medical autonomy by "forcing him to apply limited financial resources to obtaining a health care plan he does not desire or forcing him to save his income and pay a penalty." Following the Sixth Circuit in *U.S. Citizens Assoc. v. Sebelius*, the Ninth Circuit rejected Coons' argument.

As the panel explained, "The individual mandate does not require that an individual select a particular insurance plan, does not require that the individual use an insurance plan once purchased, and does not restrict an individual's right to contract for care directly with the physician of his or her choosing." Thus, the panel concluded, "The fact that the individual mandate forces Coons to expend funds on either medical insurance or a penalty implicates Plaintiff's economic interests only — a substantive due process right abandoned long ago by the Supreme Court." This Ninth Circuit decision, especially when combined with the Sixth Circuit's similar holding, suggests that the door is all but closed to future individual mandate challenges based on the right to medical autonomy.

Doors Left Open: Right to Privacy Challenges to the Individual Mandate and Nondelegation Challenges to the IPAB

The Ninth Circuit took a different approach to Coons' claim that the individual mandate "burden[ed] impermissibly his fundamental right to privacy in his medical information by requiring him to provide medical information to third-party insurance providers." Coons argued that, as a result of the individual mandate, health insurers would solicit medical information from him, and that disclosure would make that medical information available for warrantless government seizure.

The Ninth Circuit did not reach the merits of Coons' arguments. Instead, it ruled his privacy claim was unripe because Coons did not "allege[] that he has applied for medical insurance or that any third party ha[d] requested that he disclose his medical information as a condition precedent to obtaining the minimum required coverage." In so holding, the Ninth Circuit notably stopped short of the Sixth Circuit, which rejected a similar challenge on the merits in *U.S. Citizens Association v. Sebelius* upon finding "the individual mandate does not actually compel plaintiffs to disclose personal information to insurance companies." To be sure, the Ninth Circuit has not indicated whether it would ultimately reach the same conclusion at the Sixth Circuit. But in rejecting Coons' claim on ripeness grounds — not merits — the Ninth Circuit leaves open the possibility of a contrary holding. In so doing, the Ninth Circuit decision leaves an open door for right to privacy arguments in future ACA challenges.

Similarly, the Ninth Circuit rejected on ripeness grounds a constitutional challenge brought by Dr. Eric Novack, an Arizona orthopedic surgeon, claiming the IPAB violated the nondelegation principle of Article I. The IPAB is a new advisory panel tasked with issuing budgetary recommendations for Medicare if the program exceeds growth projections. Under the ACA, the IPAB will issue recommendations for cost savings if the chief actuary determines that actual growth in Medicare spending will exceed projected spending growth in a particular year. Those recommendations will be implemented after review and approval by Congress.

In one of the first decisions by a federal appellate court addressing the IPAB, the Ninth Circuit refused to decide Novack's claim on the merits. Novack asserted that, as an orthopedic surgeon who received

payments from Medicare patients, he could reasonably anticipate financial harm from the IPAB's actions and market displacements anticipating those actions. The circuit court found his claim unripe because the IPAB is prohibited from recommending reductions in payment until Jan. 1, 2019. In so holding, the court found Novack's claim of future harm "highly speculative," which it saw as "wholly contingent upon the occurrence of unforeseeable events."

As with Coons' right to privacy claim, the Ninth Circuit did not indicate how it would have ruled on Novack's IPAB challenge on the merits. Like with Coons' right to privacy argument, though, the court's dismissal of Novack's IPAB argument on jurisdictional, not merits, grounds suggests this is an open door for future ACA litigation, especially in 2019 and beyond.

Takeaways

Coons v. Lew is a major victory for the Obama administration. It also serves as a warning to would-be plaintiffs that challenges to the ACA's individual mandate based on contrary state laws or the right to medical autonomy are likely to fail.

That said however, the Ninth Circuit has left an open door that is likely to prompt further litigation on whether the individual mandate violates an individual's right to privacy and whether the IPAB violates the Constitution's nondelegation principles.

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