



# The Supreme Court Decision: What It Means for Medicaid

Families USA • August 2012

**O**n June 28, the Supreme Court upheld the constitutionality of the Affordable Care Act. The opinion resulted in one change in the law. The court, in an opinion written by Chief Justice Roberts, ruled that threatening to withhold all of a state's Medicaid funding if that state refuses to take up the Medicaid expansion is unconstitutional. As a result, expanding Medicaid in 2014 is no longer something states must do, but a choice that states can take up or not. That decision surprised many legal scholars and was contrary to all lower court rulings in the case, which had found the requirement that states take up the expansion to be constitutional. Nevertheless, the expansion itself is constitutional; only the penalty for states that don't expand Medicaid changes.

*Nothing else* in the Affordable Care Act was altered by the Court's decision.

Although this is the only change in the law, it is potentially significant. Some governors are now saying that their state will not, or may not, take up the expansion. This definitely means more work for advocates, who now need to make sure that their state chooses the Medicaid expansion. But it is important to remember that Affordable Care Act implementation still moves forward.

The Secretary of Health and Human Services has issued some guidance on how she interprets and intends to apply the Supreme Court's ruling. Some questions remain outstanding. Drawing on guidance issued to date and on our interpretation of certain aspects of the opinion, we've outlined some points advocates should know about the ruling and what it means for Medicaid and the Medicaid expansion. We've also included a brief summary of what this means for advocates' work moving forward in states that have not yet made a commitment to expand Medicaid.

A few of these points may change or be modified as additional guidance is released by the Secretary.



**For more details about the court decision, see:**

*A Closer Look: The Supreme Court's Health Care Decision*, available online at <http://familiesusa2.org/assets/pdfs/health-reform/Closer-Look-at-Court-ACA-Decision.pdf>.



**Information on HHS guidance:**

Available online at <http://www.familiesusa.org/issues/medicaid/expansion-center.html>.

## What Advocates Need to Know

### ■ No changes to the Affordable Care Act other than the states' penalty for not expanding

- The only thing in the Affordable Care Act that the Supreme Court opinion changed was the provision that allowed the federal government to withhold existing federal Medicaid funds from states that do not expand their Medicaid program. Everything else in the Act remains in place.<sup>1</sup>
  - **The Maintenance of Effort requirement remains in effect.** The Maintenance of Effort requirement in the Affordable Care Act stays in place. Nothing in the law links this requirement to the expansion. It remains in effect as written in the law.<sup>2</sup>
  - **All other aspects of the Affordable Care Act, including those related to the existing Medicaid program, remain in place.** The opinion did not change anything related to the use of Modified Adjusted Gross Income (MAGI) in Medicaid determinations, provider payment changes, Medicaid options for home- and community-based services, or any other aspect of the law. These changes remain in effect whether a state elects to take up the expansion or not.
  - **Support for expanding Medicaid through IT improvements remains.** The availability of funding for systems upgrades remains. The Department of Health and Human Services has explicitly stated that a state can receive extra funding for Medicaid information technology upgrades and exchange implementation costs, even if it has not decided whether it will expand Medicaid or operate its own exchange. If a state ultimately decides that it will not expand Medicaid or have its own exchange, money received for systems upgrades and development will not have to be refunded.<sup>3</sup>

### ■ No changes to the traditional Medicaid program

The law did not affect the operation of states' current Medicaid programs in any way.

- **Nothing in the opinion affected past Medicaid expansions.** Past expansions are not changed, or called into question, by the opinion at all. Justice Roberts viewed this expansion as being different from past expansions. Specifically, he noted that this expansion is different because it extends Medicaid to a different population, has a different required benefits package, and has a different federal matching rate.
- **Nothing in the opinion changes how the Secretary may apply penalties in the existing Medicaid program.** Nothing in the opinion changes the Secretary's option to withhold existing Medicaid funds from states that violate certain provisions of the statute related to the current Medicaid program. The opinion applied only to withholding existing Medicaid program funds for failure to take up the expansion.

## ■ No changes to expansion requirements

The Court did not change the expansion itself in any way or alter requirements for states that elect to take it up. It is important to note that the Court also did not simply turn the expansion into an optional coverage group under the traditional Medicaid program. Chief Justice Roberts viewed the expansion as a separate program, distinct from traditional Medicaid, that states can elect to accept or reject.<sup>4</sup> States that accept that program must comply with all of its requirements.

- **States that take up the expansion must comply with all of its terms and conditions.** States that take up the Medicaid expansion must comply with all the requirements outlined in the Affordable Care Act and related regulations. That includes all Medicaid program requirements and patient protections that were always intended to apply to the expansion population. The only thing about the expansion that changes is the application of the penalty related to withholding traditional Medicaid program funds.
- **States that do not comply with the expansion's requirements can lose their expansion funding.** States that elect to take up the expansion can lose up to 100 percent of their expansion funds if they do not comply with expansion requirements. However, in viewing the expansion as a separate program, the opinion implies that failure to comply with expansion requirements cannot put traditional Medicaid funds at risk.<sup>5</sup>
- **There is no deadline for a state to declare its intention to expand Medicaid.** The Department of Health and Human Services has been clear that there is not a date by which states have to let it know whether or not they are taking up the expansion.<sup>6</sup>
- **The federal match for the expansion population did not change.** Nothing in the opinion altered the level of, or the dates for, the “super enhanced” federal match that states will receive for the expansion population. That match level remains as 100 percent in 2014, 2015, and 2016; 95 percent in 2017; 94 percent in 2018; 93 percent in 2019; and 90 percent in 2020 and thereafter.
- **The expansion population is a distinct coverage group.** It does not change the law's treatment of the Medicaid expansion as a single, distinct coverage group. Nothing in the Supreme Court opinion suggests that a state can expand to less than 138 percent of poverty and still receive the “super enhanced match.”<sup>7</sup>

### ■ **The availability of tax credits did not change**

The Affordable Care Act builds upon existing health care coverage. To provide health care to low-income populations, it relied on expanded Medicaid coverage, and the law is structured around its requirement that states expand Medicaid. As a result, there is a gap in the availability of premium tax credits. The Court's opinion did not change that.

- **Premium tax credits do not apply to individuals with incomes below 100 percent of poverty.** The law was written requiring all states to expand Medicaid coverage, so all low-income individuals would have Medicaid as a coverage option. Premium tax credits were designed to be available only to individuals with incomes at or above 100 percent of poverty. The opinion did not change this.
- **The penalty exemptions are still in place.** Low-income individuals who cannot find affordable insurance will be able to apply for hardship exemptions to the requirement to buy coverage, so they will not have to pay the penalty for not having coverage. Additionally, the penalty does not apply to individuals who have incomes so low that they do not have to file taxes.

## **What this means, for people who could benefit from the expansion and for advocates**

In the wake of the Supreme Court decision, some governors are saying that they will not expand Medicaid in their state. Others are not committing. If a state doesn't expand Medicaid in 2014, there will not be a real health insurance option for most low-income people who would otherwise have gained coverage under the expansion.

In part, that's because premium tax credits are not available for people with incomes below 100 percent of poverty. But that's not the only reason. Premium tax credits are not the best choice for those with very low incomes. Even if they were available at lower incomes, they wouldn't reach everyone. For low-income people, Medicaid is the best option and the best benefits package. (See "Low-Income People Need Medicaid, Not Tax Credits" on page 7.)

## What Advocates Can Do

Advocates need to lay the groundwork to make sure that their state expands. Depending on the state, this could be a long process. Here are some ideas for getting started.

### ■ **Work with non-traditional partners.**

Develop a broad coalition of groups that stand to gain if more low-income people in the state have coverage. This includes looking to some groups that might be non-traditional allies. These could include health care providers, particularly safety-net hospitals. It could include health insurers, particularly Medicaid managed care plans. Commercial plans that might be providing exchange coverage could be partners, as well—people cycle on and off Medicaid, and will move between Medicaid eligibility levels and the exchange. Continuous coverage can mean better health and lower costs for insurers in the exchanges. Drug manufacturers, both generic and brand companies, have an interest in broader Medicaid coverage, too.

### ■ **Encourage your state to study the impact of coverage.**

Encourage your state to do a careful—and thorough—analysis of the impact of expanding Medicaid. This should include a careful and thorough financial analysis, as well as an assessment of indirect costs and benefits of expansion that would affect state residents. Encourage your state to get input from multiple stakeholders during this process, and volunteer to be part of any working group formed. Here are a few points to consider.

- Financial analyses should look at expected savings as well as a state's expected costs. Savings include reductions in uncompensated care costs and reductions in costs for state and county programs that provide health care to the low-income uninsured.
- Make sure that any analyses count only state—not state and federal—Medicaid spending as a state cost. Also, make sure that analyses do not attribute costs associated with increased enrollment in traditional Medicaid entirely to the Medicaid expansion. In 2014, most states expect an increase in Medicaid enrollment in their traditional, non-expansion Medicaid population. That's because people currently eligible for Medicaid, but not enrolled, will hear more about health care, the new options, and the requirement to have insurance coverage. As a consequence, many will sign up for Medicaid. This will happen to some extent whether or not a state expands Medicaid.
- The state should consider the jobs that might be created due to new federal funds flowing into the state and the increased tax revenue and business activity associated with those jobs.

- **Generate broad support for the expansion.**

Work to build public support for expanding Medicaid. That includes making the public aware of how expanding Medicaid can help everyone in your state. For example, leaving a large number of people in your state uninsured will mean that uncompensated care costs will remain high. Providers will continue to make up for those costs with higher charges for everyone else. That translates into higher insurance premiums for employers and everyone else who purchases insurance. Expanding Medicaid can keep health care costs lower for everyone in your state.

- **Work with media outlets and find personal stories.**

Part of generating broad support includes working with media. Papers and other news outlets are more likely to cover the issue if you have a personal story of someone who could be helped by expanding Medicaid. Start gathering personal stories now.



**For more information on story banking, see:**

*Sharing Across the States: Strategies for Story Banking*, available online at <http://familiesusa2.org/assets/pdfs/health-reform/Across-the-States-Story-Banking.pdf>.

- **Try to bring hesitant Governors along.**

If your governor has not definitely said no to expansion, but isn't sure, work with decision makers in your state government to try to shape his or her decision. Making sure that this is a careful, well thought out, and deliberative process could help.

Remember, the Supreme Court decision was very narrow—it changes only one aspect of the Affordable Care Act: the application of the penalty of withholding all existing Medicaid funds to the expansion. The expansion itself, and the rest of the law, are constitutional and can move forward.

There is no question that, in many states, that narrow decision may have a big impact, or that in many states, it will mean a lot of additional work for advocates. But the Medicaid expansion is without question a good financial deal for states and for their citizens. Objective, thorough analysis should help make that clear.

## Low-Income People Need Medicaid, Not Tax Credits

There were good reasons for Congress, in drafting the Affordable Care Act, to limit the premium tax credits to individuals with incomes at or above 100 percent of poverty.

First, the law was built on a requirement that states expand their Medicaid programs. Medicaid would be available for low-income families, and it is the best option for them. Its benefits package is uniquely suited to meet the needs of low-income populations. It includes transportation and other services that commercial plans do not offer, services that are vital for lower-income populations.

Medicaid coverage is also more fiscally responsible. On a per-person basis, Medicaid coverage is projected to be less costly to the government than tax credits through the exchanges, in part because of Medicaid's low administrative costs.

Premium tax credits will work well for middle class families. But, for those with very low incomes, they are not as good an option as Medicaid. Many of those who will be eligible for coverage

through the Medicaid expansion will have incomes below the federal tax filing threshold, which in 2011 was an annual income of \$9,500, about 87 percent of poverty. Obviously, tax credits would not be a good choice for them. The premium tax credits, even at their most generous, still require individuals to pay a small portion of their premiums. Those with incomes below the poverty level truly do not have any money to spare for premiums, no matter how small. For them, Medicaid is a much better option.

In designing seamless coverage, Congress built on the systems we have in place. Medicaid has been good coverage for low-income people, and was the logical way to expand coverage for that population.<sup>8</sup> When Congress drafted the Affordable Care Act, existing legal doctrine did not raise questions about the constitutionality of that choice, as underscored by all the lower court decisions that upheld the expansion and the penalty as written in the Affordable Care Act.

## Endnotes

<sup>1</sup> In her July 10, 2012 letter to the Governors, Department of Health and Human Services Secretary Kathleen Sebelius stated, “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.”

<sup>2</sup> The Affordable Care Act requires that states maintain Medicaid eligibility until such time as a state has a functioning exchange.

<sup>3</sup> July 13, 2012 letter from Marilyn Tavenner, Acting CMS Administrator, Department of Health and Human Services, to Robert McDonnell, Chairman, Republican Governors Association.

<sup>4</sup> In finding that the expansion constituted a separate program, Chief Justice Roberts wrote, “We cannot agree that existing Medicaid and the expansion dictated by the Affordable Care Act are all one program simply because ‘Congress styled’ them as such.” In his opinion, he viewed the Medicaid expansion as “a shift in kind, not merely degree.” *National Federation of Independent Business v. Sebelius*, 567 US—, Slip Ops. No. 11-393 and 11-398, June 28, 2012.

<sup>5</sup> In the Supreme Court’s opinion, Chief Justice Roberts wrote, “The Secretary cannot ... withdraw existing Medicaid funds for failure to comply with the requirements set in the expansion.” However, with regard to complying with expansion requirements, he wrote: “(The opinion) 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 expansion fails to comply with the requirements of that Act.” *National Federation of Independent Business v. Sebelius*, 567 US—, Slip Ops. No. 11-393 and 11-398, June 28, 2012.

<sup>6</sup> July 13, 2012 letter from Marilyn Tavenner, op. cit.

<sup>7</sup> The Secretary continues to have broad authority under section 1115 of the Social Security Act to waive Medicaid requirements, and that authority extends to the expansion population. It is unclear at this time whether she will exercise that authority for the expansion. However, the Secretary cannot waive federal matching requirements. Because the law bases receipt of the “super enhanced” match on coverage for the entire expansion population, most policy analysts argue that the Secretary does not have the authority to authorize anything less than a full expansion at the “super enhanced” match rate. Additionally, existing 1115 waiver requirements related to budget neutrality would continue to apply. See the Congressional Research Service’s July 16 memorandum by Kathleen S. Swendiman, “Selected Issues Related to the Effect of NFIB v. Sebelius on the Medicaid Expansion Requirements in Section 2001 of the Affordable Care Act,” for a discussion of this issue.

<sup>8</sup> See Families USA’s *Medicaid’s Success: Good Care*, for a discussion of Medicaid and its role improving the health status of low-income people. Available online at <http://familiesusa2.org/assets/pdfs/medicaid/Medicaid-Is-Good-Care.pdf>.

**This brief was written by:**

*Dee Mahan*  
*Director of Medicaid Advocacy*  
*Families USA*

**The following Families USA staff contributed  
to the preparation of this report:**

*Kathleen Stoll, Deputy Executive Director,*  
*Director of Health Policy*

*Peggy Denker, Director of Publications*

*Nancy Magill, Senior Graphic Designer*