The Policy Watch provides timely updates and resources on Hill and Administration activities impacting HIV and viral hepatitis programs. Please visit NASTAD’s website at www.NASTAD.org for more information.

SPECIAL ISSUE – UNITED STATES SUPREME COURT DECISION ON THE AFFORDABLE CARE ACT AND IMPLICATIONS FOR HIV/AIDS AND VIRAL HEPATITIS PROGRAMS

On June 28th, the United States Supreme Court released its much-awaited decision on the constitutionality of the Patient Protection and Affordable Care Act (ACA), the comprehensive federal health care reform law passed in March 2010. In an opinion authored by Chief Justice Roberts, the Court ruled to uphold the ACA. Specifically, the Court rejected constitutional challenges to the law’s individual mandate, which will require most people to have insurance coverage or face a penalty. With regard to the challenge to the Medicaid expansion, the Court upheld the expansion, but ruled that states that choose not to expand cannot be at risk for losing federal funds for the entire program, a condition included in the ACA. States who choose not to expand their Medicaid programs in 2014, however, will not be entitled to any of the considerable federal funds attached to the expansion.

Background
In March 2010, Congress enacted the ACA. Many of the provisions have already gone into effect, and federal and state governments have worked over the past two years to implement these provisions and to prepare for the insurance expansions slated to go into effect in 2014. Following passage of the law, a number of states brought legal challenges to several of the law’s provisions. Those challenges slowly worked their way up the federal court system, and in March 2012, the United States Supreme Court heard oral argument on four consolidated cases. The challenges contained the following judicial questions:

- Whether the individual mandate, the provision in the law that requires most people to have insurance coverage or to pay a penalty, exceeds Congress’ power
to regulate interstate commerce under the Constitution’s Commerce Clause or Congress’ power to tax;

- Whether, if the individual mandate is unconstitutional, the rest of the law (or certain parts of the law) can stand alone;

- Whether the Medicaid expansion, which requires every state’s Medicaid program to expand eligibility in 2014, amounts to unconstitutional federal coercion of states in violation of the Tenth Amendment.

The Decision
In an opinion authored by Chief Justice John Roberts, the Court ruled the following:

- **Individual Mandate Upheld**
  The main argument against the constitutionality of the individual mandate was that it violated Congress’ power to regulate interstate commerce under the Commerce Clause. The Court appeared to accept this argument, but in a surprise move, the majority voted to uphold the mandate on an alternative ground. The Court held that the individual mandate was a valid exercise of Congress’ power to tax, finding that the decision to go without insurance is “just another thing the Government taxes, like buying gasoline or earning income.” The decision to uphold the individual mandate was crucial to the viability of many of the other private insurance reforms. By requiring everyone (sick and healthy people alike) to have insurance, the individual mandate makes it possible to spread risk over a larger pool of people, lower the cost of health insurance, and require insurance plans to cover everyone regardless of pre-existing conditions. Because the individual mandate was upheld, there was no need for the Court to rule on whether the rest of the law’s provisions were severable.

- **Medicaid Expansion Upheld, but Limited**
  The Court also ruled on whether the Medicaid expansion, which expands Medicaid eligibility to most people with income up to 133 percent of the federal poverty level (FPL) in 2014, amounted to federal coercion of states to participate in the program. The Medicaid program is a federally and state funded program. States are not required to participate in the program, but all states currently do participate in order to be eligible for federal matching funds. The Court considered whether federal funding for a state’s entire Medicaid program could be conditioned on participation in the 2014 expansion. The Court ruled that the scope and breadth of the 2014 expansion is such a departure from the traditional Medicaid program that it amounts to a shift in the very nature of the program. Conditioning federal funds for both the expansion and a state’s traditional Medicaid program on state implementation of the expansion, therefore, went
beyond a carrot to incentivize state participation, and crossed the line to government coercion.

In short, the Court upheld the expansion, but ruled that a state that chooses not to expand its program to people with income up to 133 percent FPL in 2014 would not be at risk for losing federal funds for the entire program. States who choose not to expand their Medicaid programs in 2014, however, will not be entitled to any of the considerable federal funds attached to the expansion. Because federal subsidies to purchase private insurance through exchanges are only available for those with income of at least 100 percent FPL, there could be a significant gap in coverage for very low-income people living with HIV in states that opt not to expand. Importantly, all of the other Medicaid reforms – including eligibility and enrollment systems reforms, a switch to “Modified Adjusted Gross Income” to determine income eligibility for certain populations, and new Medicaid Disproportionate Share Hospital (DSH) funding formulas – remain in place.

What the Decision Means for HIV/AIDS and Viral Hepatitis Programs
The political and policy implications of the ruling are still developing, but the following are some of the immediate implications for HIV/AIDS and viral hepatitis programs:

- **The ACA remains the law of the land, and state implementation will likely ratchet up over the coming weeks and months.** The law, in its entirety, was upheld, meaning that federal and state implementation will continue. Deadlines for implementation activities, particularly around state-based exchanges, are fast approaching, and states that had anxiously awaited the final Supreme Court word on the law will be working to quickly meet these deadlines. For instance, states must choose an “Essential Health Benefits” benchmark plan for private insurance plans sold through exchanges by September of this year and must decide whether to operate a state-based exchange by November. State task forces, special legislative sessions, and agency planning bodies will likely increase, and there may be opportunities for health departments to be involved in these implementation and planning activities.

- **Overcoming the major legal challenges to the law was an important hurdle, but the fight in Congress is not over.** Shortly after the Supreme Court announced its decision, Republicans made renewed vows to legislatively repeal the ACA. A repeal vote is scheduled in the House of Representatives on July 11th, 2012. Republican backers acknowledge such a bill has virtually no chance of passing the Senate. Over the coming months, it is likely that individual ACA provisions will be subject to piecemeal attack and defunding attempts. The looming federal spending cuts and sequestration measures set to go into effect in January 2013 will also have significant implications for certain ACA funding as
well as a range of other public health programs and funding. Many see the 2012 elections as (the next) watershed moment for the future of health care reform.

- Ensuring that the Medicaid expansion is implemented in every state will be more difficult, but states still have a lot to gain from opting into the expansion. At the state level, in order to ensure that the Medicaid expansion is fully implemented, it will be imperative to make the public health, individual health, and economic case for full implementation. Though the threat of loss of federal funding for the entire Medicaid program is gone, there is still a significant amount of federal money at stake for the implementation of the expansion in 2014, and the following considerations will play into states’ decisions of whether to opt into the expansion:

  o The federal government pays the full cost of the expansion in the years 2014 through 2016, with a gradual reduction to 90 percent federal funding by 2020 and in subsequent years. In short, taking up the Medicaid expansion entitles states to billions of federal dollars and is still a very good deal for states.

  o In addition to federal money for the eligibility expansion, states may apply for enhanced federal matching rates to update their information technology (IT) and eligibility systems. States will receive a 90 percent federal match (up from the customary 50 percent match for administrative expenses) to put in place systems that will streamline the application and enrollment process in coordination with exchanges.

  o Safety net hospitals could lose out if states opt not to expand Medicaid as the ACA intended. In recognition of the fact that full implementation of health reform will result in dramatic reductions in the uninsured, the ACA reduces Disproportionate Share Hospital (DSH) payments to safety net hospitals. DSH payments provide billions of dollars of federal funding for uncompensated care to hospitals that serve a large proportion of low-income and uninsured people. Medicaid DSH payments are slated to be gradually reduced by $18 billion by 2020. The law requires the Department of Health and Human Services (HHS) to use a formula that takes into account the proportion of the state’s residents who are uninsured (DSH payments to states with higher levels of uninsured will be reduced at a slower rate). States that opt not to expand Medicaid in 2014 may nonetheless still be subject to DSH reductions, putting extra financial burden on safety net hospitals.

State governors and elected officials who have been opposed to full ACA implementation from the beginning have already made statements casting doubt
on whether states will avail themselves of the billions of dollars in federal funding to expand Medicaid. In the wake of the Supreme Court decision, several state governors are also contemplating a renewed push for Congressional approval to block grant the Medicaid program. Importantly, several other state governors (e.g., Washington and Illinois) have publicly stated their intention to continue full steam ahead with implementation of the Medicaid expansion. Though it is difficult to see how states could justify passing up billions of federal dollars to expand insurance coverage in their states, it is still too early to tell what every state will do. NASTAD will keep a close eye on and keep members informed of federal and state developments.

Next Steps
The ACA remains the law of the land, and implementation at the federal and state levels will continue. NASTAD will continue to offer resources and technical assistance to health departments as major provisions of the ACA go into effect. Over the coming days and weeks, NASTAD will continue to analyze implications of the Medicaid ruling and work to identify next steps to ensure that the Medicaid expansion becomes a reality in every state. It will be more important than ever for state health departments to be in conversation with state Medicaid offices as states contemplate whether they will opt into the Medicaid expansion.

Additional health care reform resources and analyses of the decision are available at:

- HIVHealthReform.org – www.hivhealthreform.org
  - Recent guidance on Essential Health Benefits for exchange plans:
    - Center for Consumer Information and Insurance Oversight, Essential Health Benefits: List of the Largest Three Small Group Products by State (July 2012)
    - Center for Consumer Information and Insurance Oversight, Essential Health Benefits Bulletin (December 2011)
- Center on Budget and Policy Priorities – www.cbpp.org
  - Health Reform’s Medicaid Expansion is a Very Good Deal for States
- Kaiser Family Foundation – www.kff.org
  - State Adoption of Key Medicaid ACA Options (including expansion)
  - State Medicaid Expansion Status/Details
  - State Health Insurance Exchange Status
  - States That Have Filed Federal Lawsuit on ACA
- Supreme Court of the United States Blog – http://www.scotusblog.com
- Treatment Access Expansion Project – www.taepusa.org

Please contact Amy Killelea if you have questions.
Upcoming Events
NASTAD Webinar on the Supreme Court Decision – July 17, 2012 at 3:00 pm EDT
NASTAD ADAPs & Health Reform Eastern Region Meeting – August 20-21, 2012, Washington, DC
NASTAD National ADAP TA Meeting – August 22-24, 2012, Washington, DC

[i] The Court heard a fourth argument concerning whether opponents brought the case prematurely and must wait until 2014 when the penalties for not having insurance coverage go into effect to bring a challenge. This argument was rejected by the Court at the outset of the opinion.