

# Understanding Legal Challenges to the Affordable Care Act: A Brief Review of Key Issues

NOVEMBER 2020

## INTRODUCTION

Upon its implementation in 2014, the Patient Protection and Affordable Care Act (ACA) fundamentally altered the nation's health care system by providing access to health insurance to millions of Americans through expanding Medicaid, incentivizing employers of a certain size to provide employer-sponsored coverage, and creating the subsidized health insurance marketplace.<sup>1</sup> The ACA also mandated various health insurance reforms and consumer protections for the individual, small group, and large group markets.<sup>2</sup>

The ACA has come under attack by those opposing some of its provisions. The subject of numerous legal challenges, the ACA has resulted in two landmark U.S. Supreme Court opinions: *National Federation of Independent Business v. Sebelius* and *King v. Burwell*. Now, as the nation's attention is fixed upon a third legal challenge to the ACA in the wake of Justice Ruth Bader Ginsburg's death in September and the confirmation of Justice Amy Comey Barrett as the newest member of the Supreme Court, questions abound regarding what these changes on the Supreme Court could mean for the future of health care in the nation and in the Commonwealth.

This brief describes key elements of the ACA and provides an overview of the *California v. Texas* case currently pending in the Supreme Court, describing how the arguments in that case build upon prior legal challenges to the ACA.

## BACKGROUND: KEY COMPONENTS OF THE ACA

Among its most notable consumer-facing reforms, the ACA prohibits insurers in the individual and small group markets from denying coverage or raising premiums based on health status or pre-existing medical conditions. The ACA also requires health plans in the individual and small group markets to cover certain required categories of health care services, such as preventive health care, inpatient and outpatient hospital visits, and prescription drugs.

Alongside these requirements for comprehensive coverage and consumer protections in the individual and small group markets, the ACA dramatically expanded the number of people who are covered. Congress enacted a number of reforms, including, first, providing billions of dollars in subsidies in the form of tax credits to low- and middle-income Americans to help them purchase health insurance.<sup>3</sup> Second, the ACA created health insurance exchanges, or "marketplaces," to facilitate convenient and well-regulated shopping for insurance.<sup>4</sup> And third, the ACA required that nearly every individual maintain a baseline amount of health insurance coverage referred to as "minimum essential coverage." This requirement is known as the ACA's "individual mandate."<sup>5</sup>

The ACA improved access to health care nationwide and in Massachusetts. According to the California-led coalition of states defending the ACA in the Supreme Court, "[N]early twelve million individuals received health care coverage in 2016 as a result of Medicaid expansions. In 2017, 10.3 million people received

### UNDERSTANDING THE INDIVIDUAL AND SMALL GROUP MARKETS

The ACA's health insurance policies and requirements differentiate between the "markets" through which insurance plans are sold. In addition to national rules regulating health insurance, states may have additional requirements and regulations.

An **individual plan, or the individual market**, refers to a fully insured health insurance plan that an individual purchases directly from an insurance carrier or through a marketplace (e.g., the Health Connector in Massachusetts).

A **small group plan, or the small group market**, refers to a fully insured health insurance plan that a group of up to 50 employees purchases from an insurance carrier, marketplace, or broker.

A **large group plan, or the large group market**, refers to a fully insured health insurance plan purchased by a group of greater than 50 employees.

coverage through the exchanges, with over 8 million receiving tax credits to help them pay their premiums.”<sup>6</sup>

Since President Obama signed the ACA in March 2010, it has proved to be remarkably resilient, surviving numerous legislative attempts at repeal. It has also weathered multiple high-profile lawsuits challenging the individual mandate and other essential components of the law. Nevertheless, *California v. Texas*, initiated in 2018 by a coalition of states led by Texas, will be the ACA’s first test with the Supreme Court after the death of Justice Ruth Bader Ginsburg.<sup>7</sup> A federal trial court in Texas and the Fifth Circuit Court of Appeals have ruled that the law’s individual mandate (and possibly the entire law) is unconstitutional, so now the high court will hear arguments regarding this latest legal challenge to the ACA.

## THE CONSTITUTIONALITY OF THE ACA’S INDIVIDUAL MANDATE

*California v. Texas*<sup>8</sup> focuses on the impact of the federal 2017 Tax Cuts and Jobs Act (TCJA) on the constitutionality of the ACA (see Table 1 for a timeline of events leading up to the case). The court is expected to hear oral arguments on November 10, 2020, and interest in the Supreme Court’s consideration of this case has only been heightened following the recent death of Justice Ruth Bader Ginsberg. In 2012, she was one of the five justices who formed the court’s majority that upheld the law in the first high-profile Supreme Court case challenging the individual mandate, and the ACA as a whole. This case was *National Federation of Independent Business (NFIB) v. Sebelius*. The main argument advanced against the ACA in *California v. Texas* builds on the majority decision authored by Chief Justice John Roberts in *NFIB v. Sebelius*.

### *NFIB v. Sebelius*

In *NFIB v. Sebelius* case, the Supreme Court ruled by a vote of 5–4 that the individual mandate requirement exceeded Congress’s

power under the Commerce Clause. Nevertheless, the Supreme Court ultimately upheld the law by ruling that the individual mandate was a valid exercise of Congress’s power to levy taxes, a separate power granted to Congress in the Constitution. In other words, the Court interpreted the individual mandate penalty that the ACA imposed to be a tax, despite the fact that the ACA itself calls it a penalty.

In the majority opinion, Chief Justice Roberts wrote:

The text of a statute can sometimes have more than one possible meaning. To take a familiar example, a law that reads “no vehicles in the park” might, or might not, ban bicycles in the park. And it is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so.

*National Federation of Independent Business v. Sebelius*,  
567 U.S. at 562.

### The Tax Cuts and Jobs Act’s Effect on the Constitutionality of the ACA

While the ACA’s protections against insurance discrimination for those with pre-existing conditions have always been perceived relatively favorably by policymakers and the public,<sup>9</sup> the law’s individual mandate and associated penalties for noncompliance have been among the law’s less popular provisions.<sup>10</sup> In 2017, Congress passed the TCJA, the most significant tax reform law since 1986, which substantially changed tax rates and bases for individual and corporate taxpayers.<sup>11</sup> One of the individual tax reforms included in the TCJA was the de facto elimination of the penalty (by reducing it to \$0) for noncompliance with the ACA’s individual mandate.

After the TCJA became law in 2017, a group of states led by Texas filed a suit alleging that the ACA had become unconstitutional when the individual mandate penalty was eliminated.<sup>12</sup> Both the U.S. District Court for the Northern District of Texas and the Fifth

TABLE 1. TIMELINE OF EVENTS LEADING UP TO CALIFORNIA V. TEXAS

June 28, 2012	U.S. Supreme Court issues 5-4 ruling in <i>NFIB v. Sebelius</i> , upholding the ACA’s individual mandate as a valid exercise of Congress’s taxing power.
December 22, 2017	President Donald Trump signs the Tax Cuts and Jobs Act (TCJA) into law, eliminating the individual mandate penalty as of January 1, 2019.
February 26, 2018	20 states led by Texas sue the federal government to have the entire ACA struck down.
December 14, 2018	The Northern District of Texas finds that the individual mandate is unconstitutional and not severable from the remainder of the ACA.
January 7, 2019	California and other intervenor states appeal to the Fifth Circuit Court of Appeals.
December 18, 2019	The Fifth Circuit affirms the lower court decision finding the individual mandate unconstitutional but sends the case back to the Northern District of Texas for further review regarding whether the mandate can be separated from the rest of the law (often referred to as “severability”).
March 19, 2020	U.S. Supreme Court agrees to hear appeal of Fifth Circuit decision.
November 10, 2020	U.S. Supreme Court hears oral arguments.

Circuit Court of Appeals agreed with the main arguments raised by Texas and its co-plaintiffs. The District Court not only found the individual mandate unconstitutional, it also ruled that it is not “severable” from the remainder of the ACA. In other words, if the individual mandate provision was struck down, the rest of the law could not remain in place without it.

Following the District Court’s decision, a coalition of states led by California took over from the U.S. Department of Justice the defense of the ACA in court. It appealed the District Court’s decision to the Fifth Circuit Court of Appeals. On December 18, 2019, the Fifth Circuit Court affirmed the lower court’s decision that the individual mandate was rendered unconstitutional as a result of the TCJA. However, the Fifth Circuit ordered the case back to the District Court for further review as to whether the remainder of the ACA could remain intact if the individual mandate provision were struck down. The Fifth Circuit was especially critical that the District Court had failed to thoroughly analyze whether any portion of the ACA could independently survive without the individual mandate requirement. The Fifth Circuit observed that because there was no discussion of numerous ACA provisions other than the individual mandate, it had no choice but to send the case back to the District Court for further analysis regarding how striking down the individual mandate provision would affect other aspects of the law.

Following the Fifth Circuit’s decision, the California coalition sought review by the Supreme Court. The court agreed to consider the appeal in the current Supreme Court term<sup>13</sup> and scheduled oral arguments to take place on November 10, 2020.

### **Seating of Judge Amy Coney Barrett**

After Justice Ginsburg’s death, President Donald Trump nominated Judge Amy Coney Barrett to fill Justice Ginsburg’s seat on the Supreme Court. Judge Amy Coney Barrett was confirmed to the Supreme Court on October 26, 2020.

Some observers suggest that Judge Barrett’s confirmation presages the end of the ACA.<sup>14</sup> As evidence, they reference prior publications wherein Judge Barrett criticizes the majority decision in *NFIB v. Sebelius*, stating that its author, Chief Justice Roberts, “pushed the Affordable Care Act” “beyond its plausible meaning to save the statute.”<sup>15</sup> During her confirmation hearings, however, Judge Barrett defended her ability to maintain impartiality. She stated that she has “no agenda” toward the ACA and pledged not to take her own policy views into account when deciding cases.<sup>16</sup> In a particular noteworthy exchange during her confirmation hearing, Judge Barrett explained the doctrine of severability stating, “if you have a statute — and the Affordable Care Act is obviously a very long statute — if there is one provision within the statute that is unconstitutional, the question is whether that one section can simply be rendered null and excised from the statute.” She continued, “The presumption is always in favor of severability.”

Of course, it is impossible to know how Justice Barrett will vote in *California v. Texas* if she participates in the case. Justice Barrett’s potential vote on this case has received considerable attention since she is replacing one of the key votes, Justice Ginsburg’s, to uphold the ACA in previous cases. However, it is worth noting that there is also uncertainty about how Justices Brett Kavanaugh and Neil Gorsuch will vote on this case, especially since neither was on the court when the most recent major case challenging the constitutionality of the ACA was heard. Both Justices Kavanaugh and Gorsuch replaced justices who had voted against the constitutionality of the ACA in *NFIB v. Sebelius*, so one of them could conceivably cast the deciding vote to uphold the ACA.

### **IMPACTS ON MASSACHUSETTS**

As a complement to this brief, the Blue Cross Blue Shield of Massachusetts Foundation collaborated with the Urban Institute to provide state-level estimates of the impact of an ACA repeal under a few scenarios. Those estimates show that 422,000 Massachusetts residents will lose health care coverage if the ACA is repealed and the uninsured rate will increase from 4.4 percent to 12.0 percent of the nonelderly population (i.e., among individuals ages 0–64). These estimates, as well as estimates associated with other scenarios, are summarized in [\*Potential Coverage and Federal Funding Losses for Massachusetts if California v. Texas Ultimately Overturns the Affordable Care Act.\*](#)

### **CONCLUSION**

On November 10, 2020, we will hear some of the oral arguments before the Supreme Court in its consideration of *California v. Texas*. And we will learn more about how the new makeup of the Supreme Court may ultimately impact the fate of the ACA and, more importantly, the lives of the hundreds of thousands of consumers in Massachusetts who have access to health insurance as a result of this law.

## ENDNOTES

- 1 Opening Brief for the Petitioners, p. 6, *State of California, et al. v. State of Texas, et al.*, 2020 WL 2475940 (U.S.). Available at [https://affordablecareactlitigation.files.wordpress.com/2020/05/20200506123245803\\_california-v.-texas-no.-19-840-opening-brief-for-the-petitioners-final-pdf-a-for-filing.pdf](https://affordablecareactlitigation.files.wordpress.com/2020/05/20200506123245803_california-v.-texas-no.-19-840-opening-brief-for-the-petitioners-final-pdf-a-for-filing.pdf).
- 2 The framework for the ACA and specific policies regarding health care coverage, like guaranteed issue and community rating, were substantially informed by Massachusetts' own landmark health reform in 2006 and prior reforms, which included many of these provisions. (The requirement to provide coverage for health conditions diagnosed before an individual's health insurance enrollment date is often referred to as the "guaranteed issue requirement." The ACA's prohibition against charging more for pre-existing conditions is commonly referred to as the "community rating requirement.") Following passage of the ACA in 2010, Massachusetts began aligning its existing policies and programs with those established by this national legislation. For more information on this process, see *Re-Forming Reform: What the Patient Protection and Affordable Care Act Means for Massachusetts*, available at <https://bluecrossmafoundation.org/publication/re-forming-reform-what-patient-protection-and-affordable-care-act-means-massachusetts>.
- 3 *King v. Burwell*, 135 S. Ct. 2480, 2487-2489 (2015).
- 4 *Id.* at 2485.
- 5 *Id.* at 2486.
- 6 Opening Brief for the Petitioners, p. 6, *State of California, et al. v. State of Texas, et al.*, 2020 WL 2475940 (U.S.). Available at [https://affordablecareactlitigation.files.wordpress.com/2020/05/20200506123245803\\_california-v.-texas-no.-19-840-opening-brief-for-the-petitioners-final-pdf-a-for-filing.pdf](https://affordablecareactlitigation.files.wordpress.com/2020/05/20200506123245803_california-v.-texas-no.-19-840-opening-brief-for-the-petitioners-final-pdf-a-for-filing.pdf) (September 8, 2020).
- 7 Kaiser Health News Morning Briefing (2020, September 21). Available at <https://khn.org/morning-breakout/obamacare-in-greater-judicial-jeopardy-after-ruth-bader-ginsburgs-death/>.
- 8 On May 6, 2020, the petitioners, including a coalition of states led by California and the United States House of Representatives, filed briefs with the U.S. Supreme Court supporting the constitutionality of the minimum essential coverage provision and the legality of the ACA.
- 9 Keith, K. (2020, September 11). What it Means to Cover Preexisting Conditions. *Health Affairs*, available at <https://www.healthaffairs.org/doi/10.1377/hblog20200910.609967/full/>.
- 10 Eibner, C. and Nowak, S (2018, July 11). *The Effect of Eliminating the Individual Mandate Penalty and the Role of Behavioral Factors*. The Commonwealth Fund, available at <https://www.commonwealthfund.org/publications/fund-reports/2018/jul/eliminating-individual-mandate-penalty-behavioral-factor>.
- 11 Gale, W; Gelfond, H.; Krupkin, A. et. al. (2018, June 13). Effects of the Tax Cuts and Jobs Act: A Preliminary Analysis. Tax Policy Center, available at [https://www.taxpolicycenter.org/sites/default/files/publication/155349/2018.06.08\\_tcja\\_summary\\_paper\\_final.pdf](https://www.taxpolicycenter.org/sites/default/files/publication/155349/2018.06.08_tcja_summary_paper_final.pdf).
- 12 *State of Texas, et. al. v. United States, et al.*, Case No. Case 4:18-cv-00167-O (N.D.Tex.), Complaint, p. 2. Available at <https://affordablecareactlitigation.files.wordpress.com/2018/09/177111358274.pdf>.
- 13 \_\_\_S.Ct. \_\_\_, 2020 WL 981805 (Mem) (2020).
- 14 See for example: Biskupic, J. (2020, October 12). *What Amy Coney Barrett Could Mean for Obamacare*. CNN Digital Expansion, available at <https://www.cnn.com/2020/10/10/politics/affordable-care-act-amy-coney-barrett-obamacare/index.html>; and McEvoy, J. (2020, October 12). *Amy Coney Barrett Hearings: Democrats Say Confirmation Will Destroy Affordable Care Act*. Forbes, available at <https://www.forbes.com/sites/jemimamcevoy/2020/10/12/amy-coney-barrett-hearings-democrats-say-confirmation-will-destroy-affordable-care-act/?sh=3f321e61a521>.
- 15 Barrett, A. (2017). *Countering the Majoritarian Difficulty*. 32 Const. Comment. 61 (book review). Available at [https://scholarship.law.nd.edu/law\\_faculty\\_scholarship/1318](https://scholarship.law.nd.edu/law_faculty_scholarship/1318).
- 16 Romoser, J. (2020, October 14). *Barrett Hearings, Day Two: "I have no agenda."* SCOTUSblog, available at <https://www.scotusblog.com/2020/10/barrett-hearings-day-two-i-have-no-agenda/>.