



# FOCUS on *Health Reform*

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## A Guide to the Supreme Court's Review of the 2010 Health Care Reform Law

After the enactment of the Affordable Care Act (ACA) in March, 2010, numerous lawsuits challenging various provisions of the landmark health care reform law were filed in the federal courts. Many of those cases were dismissed, but some federal appellate courts issued decisions on the merits of the law. In November, 2011, the United States Supreme Court agreed to consider several issues related to the constitutionality of the ACA arising out of two cases in the 11<sup>th</sup> Circuit Court of Appeals, *National Federation of Independent Business v. Sebelius*,<sup>1</sup> and *Florida v. Department of Health and Human Services*.<sup>2</sup> This policy brief explains the issues raised by the cases pending before the Supreme Court, answers some key questions about the parties' legal arguments, and considers potential effects of the Court's decisions.

### Background

The Supreme Court will consider the constitutionality of two major provisions of the ACA: the individual mandate and the Medicaid expansion.<sup>3</sup>

#### *The Individual Mandate and Related Provisions*

The minimum essential coverage provision of the ACA, known as the individual mandate, requires most people to maintain a minimum level of health insurance coverage for themselves and their tax dependents in each month beginning in 2014. The individual mandate can be satisfied by obtaining coverage through employer-sponsored insurance, an individual insurance plan including those to be offered through the new health insurance exchanges, a grandfathered health plan, government-sponsored coverage such as Medicare or Medicaid, or similar federally recognized coverage. People exempt from the individual mandate include undocumented immigrants, religious objectors, and people who are incarcerated.

To increase access to affordable health insurance, the ACA provides for the creation of health insurance exchanges which will offer qualified health plans, as well as cost-sharing assistance to people with incomes between 100% and 250% of the federal poverty level (FPL) and premium tax credits to people with incomes between 133% and 400% FPL. The ACA also includes new private insurance market regulations, including the guaranteed-issue provision, which prevents health insurers from denying coverage to people for any reason, including pre-existing conditions, and the community-rating provision, which allows health plans to vary premiums based only on age, geographic area, tobacco use, and number of family members, thereby prohibiting plans from charging higher premiums based on health status or gender. The Congressional authors of the ACA believed that without the individual mandate, the exchanges and private insurance market reforms would not work effectively due to the adverse selection effect of healthy people choosing to forego insurance.

If a person does not satisfy the individual mandate, she will owe a financial penalty, known as the shared responsibility payment. The financial penalty will be a percentage of household income,

subject to a floor and capped at the price of the forgone insurance coverage, assessed and collected by the IRS and reported on federal income tax returns. Certain individuals are exempt from the financial penalty, including people for whom annual insurance premiums would exceed 8% of their household adjusted gross income, members of American Indian tribes, people who receive financial hardship waivers, people with incomes below the tax filing threshold, and people who lacked insurance for less than three months during a year.

### *The Medicaid Expansion*

The ACA also increases access to affordable health insurance by expanding eligibility for Medicaid benefits. The Medicaid program provides health insurance coverage to people with low incomes and is jointly funded by the federal and state governments. The program is voluntary for states: states are not required to participate, but all states currently do. If a state chooses to participate in the Medicaid program, there are a number of options that it can elect, but it must follow certain federal rules.<sup>4</sup> One of the federal requirements concerns the groups of people who must be covered by a state's Medicaid program. The mandatory coverage groups have been expanded by Congress several times since the program's enactment in 1965, and currently generally include pregnant women and children under age 6 with family incomes at or below 133% FPL, children ages 6 through 18 with family incomes at or below 100% FPL, adults who meet the financial eligibility requirements for the former AFDC (cash assistance) program, and people who qualify for Supplemental Security Income benefits based on low income and disability status. The ACA again expands the Medicaid program's mandatory coverage groups by requiring that participating states cover nearly all people under age 65 with household incomes at or below 133% FPL beginning in January, 2014. To fund this expansion of Medicaid coverage, the ACA provides that the federal government will cover 100% of the states' costs of the coverage expansion beginning in 2014, gradually decreasing to 90% in 2020 and thereafter. According to the Congressional Budget Office, the ACA's Medicaid expansion will cover an estimated 16 million uninsured, low-income Americans.<sup>5</sup>

### **Key Questions**

#### **1. Who are the parties in the cases accepted by the Supreme Court, and what do they want?**

The Supreme Court has accepted issues from two cases filed in Florida, which have been consolidated. One case was filed by the National Federation of Independent Businesses (NFIB) and two individual plaintiffs who do not currently have health insurance (the private plaintiffs) against the federal government.<sup>6</sup> The NFIB and the individual plaintiffs' arguments center on the validity of the individual mandate. The private plaintiffs argue that the individual mandate is not a valid exercise of Congress's legislative powers, including its powers to regulate commerce and to levy taxes.

The other case was filed by the State of Florida, joined by 25 other states,<sup>7</sup> against the federal government. The state plaintiffs are challenging the ACA's expansion of mandatory Medicaid eligibility beginning in 2014, to nearly all people under age 65 with household incomes at or below 133% FPL. The state plaintiffs argue that the ACA's Medicaid expansion is an unconstitutional exercise of Congress's Spending Clause power because, they allege, it improperly coerces the states to participate in the

Medicaid program. The state plaintiffs also join in the private plaintiffs’ argument that the individual mandate is unconstitutional.

The federal government agencies involved in both lawsuits are the three main agencies charged with implementing and administering the ACA: the Department of Health and Human Services, the Department of the Treasury, and the Department of Labor. The federal government maintains that both the individual mandate and the Medicaid expansion are constitutional exercises of Congress’s legislative powers. The federal government wants the Court to uphold the validity of these provisions of the ACA to clear up any uncertainty about whether health care reform implementation will take effect in January, 2014.

**2. What have the lower federal appellate courts decided about the constitutionality of the ACA?**

In the cases accepted by the Supreme Court, the 11<sup>th</sup> Circuit Court of Appeals struck down the individual mandate but upheld the Medicaid expansion.<sup>8</sup> Other federal appellate courts to have considered the merits of constitutional arguments about the ACA include the D.C. Circuit Court of Appeals<sup>9</sup> and the 6<sup>th</sup> Circuit Court of Appeals,<sup>10</sup> both of which upheld the individual mandate. The 4<sup>th</sup> Circuit Court of Appeals<sup>11</sup> dismissed two ACA cases concerning the individual mandate, finding that the suits were barred under the Anti-Injunction Act (discussed below). Other cases were dismissed based upon the plaintiffs’ failure to establish standing to sue in the 3<sup>rd</sup>, 8<sup>th</sup>, and 9<sup>th</sup> Circuit Courts of Appeals, and additional ACA cases currently are pending in the 3<sup>rd</sup>, 5<sup>th</sup>, and 6<sup>th</sup> Circuit Courts of Appeals. Table 1 summarizes the federal appellate courts’ decisions to date. Nearly all the pending lower court cases concerning the ACA have been put on hold awaiting the Supreme Court’s decision. Information about the current status of ACA lawsuits across the country is available on the Health Law and Litigation website, maintained by the National Health Law Program and Georgetown University Law Center’s O’Neill Institute for National and Global Health Law, at <http://www.healthlawandlitigation.com/index.html>.

**Table 1: Summary of Circuit Courts of Appeals Decisions in ACA Litigation**

	<b>Plaintiffs’ Standing</b>	<b>Anti-Injunction Act</b>	<b>Individual Mandate</b>	<b>Medicaid Expansion</b>
<b>3<sup>rd</sup> Circuit</b>	No standing			
<b>4<sup>th</sup> Circuit</b>		ACA cases barred		
<b>6<sup>th</sup> Circuit</b>			Upheld	
<b>8<sup>th</sup> Circuit</b>	No standing			
<b>9<sup>th</sup> Circuit</b>	No standing			
<b>11<sup>th</sup> Circuit</b>			Struck down	Upheld
<b>D.C. Circuit</b>			Upheld	

**3. What issues will the Supreme Court consider in its review of the ACA?**

The Supreme Court has agreed to hear four issues. The Court will decide the constitutionality of two of the ACA’s major provisions, the individual mandate and the Medicaid expansion. These two

issues raise fundamental questions about the division of legislative power between the federal government and the states, including the Congress’s powers to regulate commerce and to tax and spend. The Court also accepted two additional issues related to the individual mandate. If the Court finds the individual mandate unconstitutional, it will decide whether the mandate is severable, allowing the rest of the ACA to remain in effect or whether all or part of the entire law must be invalidated along with the individual mandate. In addition, the Court will consider whether this is the appropriate time for courts to rule on the ACA’s constitutionality or instead whether the Anti-Injunction Act prevents courts from deciding lawsuits about the ACA until after taxpayers actually incur the financial penalty for failure to comply with the individual mandate. A diagram depicting the various legal questions before the Court is available from Kaiser Health News at

<http://www.kaiserhealthnews.org/Stories/2011/November/18/supreme-court-health-law-chart-2012.aspx>.

#### **4. What are the main arguments about the constitutionality of the individual mandate?**

The private and state plaintiffs contend that the individual mandate is not a valid exercise of Congress’s legislative powers. The parties’ arguments have centered around three constitutional provisions as a basis for the individual mandate: the Commerce Clause, the Necessary and Proper Clause, and the Taxing Power.

##### *The Commerce Clause*

The main constitutional provision at issue is Congress’s ability to regulate interstate commerce. Article I, Section 8 of the U.S. Constitution in pertinent part provides that “Congress shall have Power. . . to regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes.” The Supreme Court’s existing Commerce Clause cases establish that Congress can regulate any economic activity that Congress rationally concludes is in the stream of or substantially affects interstate commerce. The text of this constitutional provision speaks to Congress’s ability to regulate commerce among the states and does not distinguish between economic activity and inactivity.

The plaintiffs argue that a decision to not purchase health insurance constitutes inactivity, which is not connected to interstate commerce, and therefore is not subject to regulation under Congress’s commerce power. Instead, the plaintiffs maintain that the individual mandate compels people to enter the stream of commerce, which they argue is an unprecedented use of Congress’s commerce power. They maintain that the federal government is one of limited enumerated powers, with all remaining legislative powers residing in the states, which retain the general police power to regulate for the general welfare.

In response, the federal government argues that because everyone will use health care at some point in their lives, and the need for expensive health care services can be unpredictable, Congress can validly require people to buy insurance to limit the costs imposed by the uninsured on the other people in the market. When enacting the ACA, Congress found that people who do not purchase health insurance typically do not pay the full cost of the health care services that they end up consuming, because for example, hospitals may not turn away people in need of emergency care. Instead, these

costs are shifted to health care providers, insurers, and people who have insurance in the form of higher premiums, creating, in the federal government’s view, a substantial burden on interstate commerce. The federal government also argues that for the private health insurance market to function effectively, with affordable premiums for everyone, including people with pre-existing conditions, currently healthy people must participate in the market as part of the risk pool. In response to the plaintiffs’ argument that upholding the individual mandate will not leave any meaningful limits on Congress’s Commerce Clause power, the federal government argues that the appropriate check on Congress’s exercise of its legislative powers is the electorate, not the courts.

#### *The Necessary and Proper Clause*

The federal government also asserts that the individual mandate is a valid exercise of Congress’s power to enact laws that are “necessary and proper” for executing its enumerated powers, such as the Commerce Clause. Article I, Section 8 of the U.S. Constitution in pertinent part provides that “Congress shall have Power. . . to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” The plaintiffs maintain that the Necessary and Proper Clause is not an independent source of federal legislative power, and if, as they argue, the mandate is an invalid exercise of the commerce power, it cannot be saved by the Necessary and Proper Clause.

#### *The Taxing Power*

The other constitutional provision at issue regarding Congress’s power to enact the individual mandate is the taxing power. The federal government argues that the individual mandate’s “practical operation” is as a tax because the financial penalty for failure to comply with the mandate will be administered through the tax code and reasonably relates to the raising of some amount of federal revenue. The plaintiffs argue that the mandate is not a valid exercise of Congress’s taxing power because the sanction for failure to comply with the mandate operates as a civil regulatory penalty and not as a tax.

### **5. What are the implications of a Supreme Court decision on the constitutionality of the individual mandate?**

Within the context of the ACA, if the Court upholds the individual mandate, this provision of the law will take effect in 2014. If the Court invalidates the individual mandate, it will then consider whether the mandate is severable from the remainder of the law (discussed below), which could impact whether the ACA’s other provisions, particularly those related to expanding access to affordable health insurance coverage, survive and how they are implemented. Within the broader context of Congress’s legislative powers, the Court’s decision may clarify, reaffirm, or reverse course on existing constitutional doctrine, with potentially significant effects on Congress’s power to regulate interstate commerce and the constitutional balance of legislative power between the federal government and the states more generally.

## **6. If the Court invalidates the individual mandate, how could the issue of severability affect the ACA?**

If the Court decides that the individual mandate is unconstitutional, it then must decide whether the mandate is “severable” so that the rest of the ACA would survive. If the mandate is found to be unconstitutional and not severable, the entire ACA would be struck down. The Court also could decide to invalidate only some provisions of the law. The Court must determine whether the rest of the law can function independently of the individual mandate provision and whether Congress would have enacted the ACA’s other provisions without the mandate.

In the case before the Supreme Court, the trial court held that the mandate was not severable and invalidated the entire ACA. On appeal, the 11<sup>th</sup> Circuit reversed the trial court’s severability decision and struck down only the individual mandate, allowing the rest of the ACA to survive. The plaintiffs argue that the entire ACA should be struck down if the individual mandate is found to be unconstitutional because, without the mandate, the remainder of the law will not function as Congress intended.

The federal government argues that only two provisions of the ACA should be invalidated if the individual mandate is found to be unconstitutional: the guaranteed-issue provision, which bars insurers from refusing to offer coverage due to a pre-existing condition, and the community-rating provision, which bars insurers from charging higher premiums based on a person’s medical history. The federal government maintains that these two provisions would not effectively achieve Congress’s goal of making affordable coverage widely available in the absence of the individual mandate, because without the mandate, individuals could delay purchasing health insurance, and thus the health insurance market would not function effectively as Congress intended. The federal government argues that the rest of the ACA should survive because its numerous other provisions, some of which already have taken effect, are wholly unrelated to the individual mandate.

Because none of the parties is taking the position that only the individual mandate should be severed, allowing the remainder of the law to survive, as decided by the 11<sup>th</sup> Circuit Court of Appeals, the Supreme Court has appointed outside counsel to argue that position.

## **7. What is the Anti-Injunction Act, and how could it affect the case?**

Before reaching the constitutionality of the individual mandate, the Court must decide whether the federal Anti-Injunction Act (AIA) prevents the courts from deciding lawsuits about the ACA at this time. The AIA is a part of the Internal Revenue Code that bars lawsuits that seek to restrain the assessment or collection of a tax. The AIA in pertinent part provides that, subject to certain exceptions, “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person.”<sup>12</sup> Instead, individuals who want to challenge the imposition of federal taxes in the courts must first pay the tax and then seek to have the tax refunded or raise arguments about the invalidity of the tax as a defense in an IRS enforcement action. The AIA applies only to taxes and not to other sanctions contained in the federal tax code, such as non-tax penalties. The AIA is a very complex law, but essentially, taxes are enacted to raise funds to support the government, and penalties are

imposed as punishment for unlawful acts. Thus, the issue before the Court turns on whether the ACA's monetary sanction for failure to comply with the individual mandate is considered to meet the legal definition of a "tax" or a "penalty" under the AIA.

If the Court decides that the ACA's monetary sanction is a "tax" for purposes of the AIA, the courts do not have jurisdiction to hear challenges to this part of the ACA until after the tax has been assessed, which would be sometime in 2015, after 2014 tax returns are due. If the Court instead decides that the ACA's monetary sanction is a "penalty" under the AIA, then the current case can proceed, and the Court can issue a decision about the constitutionality of the individual mandate now.

The private and state plaintiffs and the federal government all argue that the AIA does not apply to the ACA's financial penalty and therefore the Court presently has legal authority to determine the constitutionality of the individual mandate. Nevertheless, the Court has to consider whether the AIA applies because this question affects whether the Court has jurisdiction to hear the case. Because none of the parties currently argue that the case is barred by the AIA (although the federal government previously took the position that the AIA did apply), the Court has appointed outside counsel to argue that the AIA does bar current lawsuits about this part of the ACA.

#### **8. What are the main arguments about the constitutionality of the Medicaid expansion?**

The Court will decide whether the ACA's Medicaid expansion is a valid exercise of Congress's spending power. Article I, Section 8 of the U.S. Constitution in pertinent part provides that "Congress shall have Power. . . to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States." The state plaintiffs argue that the Medicaid expansion unconstitutionally coerces the states by conditioning their receipt of federal Medicaid funds on their provision of coverage to an additional mandatory eligibility group, adults under age 65 with household incomes up to 133% FPL (\$14,484 per year for an individual in 2011). They allege that federal Medicaid funds are so important to states that the option to participate in the Medicaid program, and thereby comply with the associated federal requirements, has instead become coercive, and Congress should not be allowed to regulate the states in this way through the Spending Clause when it could not do so outside the Spending Clause through one of its enumerated powers.

The federal government argues that Congress may attach conditions to the receipt of federal funds pursuant to its Spending Clause power, and no court has ever invalidated such a condition as coercive. The federal government also argues that Congress has expressly reserved the right to amend the Medicaid Act, that Congress has repeatedly expanded the Medicaid program's mandatory coverage categories over the years, and that the federal government will cover nearly all the costs of the ACA's Medicaid expansion. While a group of states is challenging the Medicaid expansion, other states filed *amicus* (friend of the court) briefs with the trial court in support of the Medicaid expansion.<sup>13</sup>



## 9. What are the implications of a Supreme Court decision on the constitutionality of the Medicaid expansion?

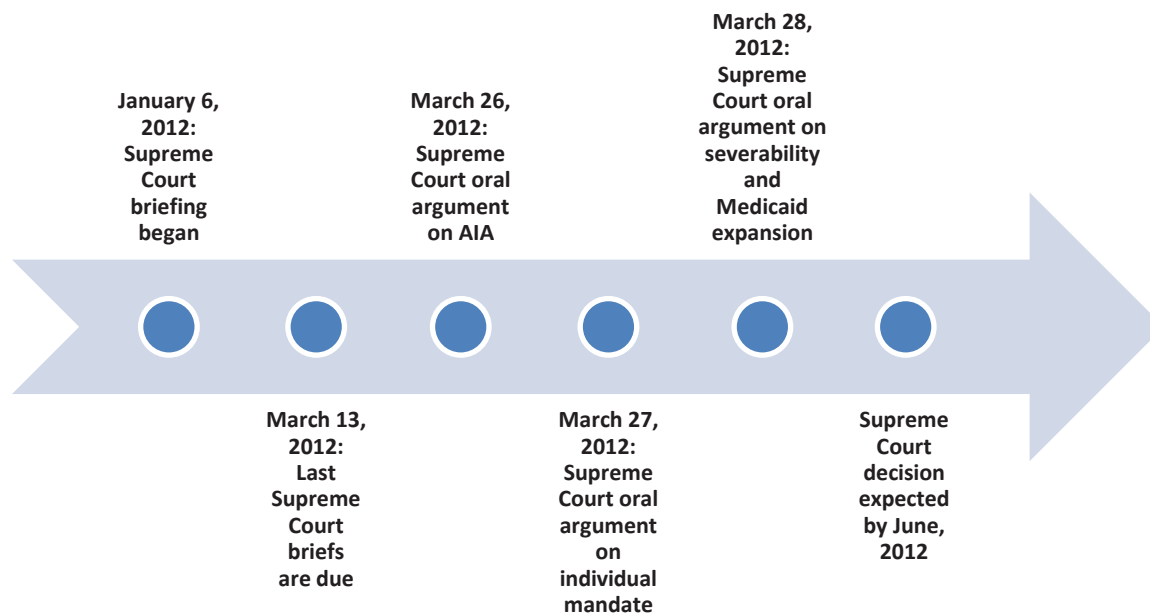
The Court's decision about the constitutionality of the Medicaid expansion could have effects far beyond whether that particular provision of the ACA is implemented, because no court to date has invalidated federal Spending Clause legislation on the basis that it is unduly coercive of states. Any developments in this area of constitutional law could extend to the wide range of Spending Clause legislation, including civil rights statutes that prohibit discrimination on the basis of race, gender and disability and federal laws in a myriad of areas, such as education, transportation, and national security. While the language of the Court's *certiorari* grant on severability is limited to the individual mandate, if the Court did find the Medicaid expansion unconstitutional, it likely would have to determine whether the Medicaid expansion is severable from the rest of the ACA as well. If both the individual mandate and the Medicaid expansion are struck down, the ACA will lack two major provisions to expand access to affordable health insurance. If the individual mandate is upheld and only the Medicaid expansion is invalidated, cost-sharing subsidies through the exchanges would be available only for individuals with incomes at or above 100% FPL, and Medicaid coverage of people with lower incomes would be at state option and at the states' regular federal matching rates, not the enhanced rates provided in the ACA.

### Looking Ahead<sup>14</sup>

The Supreme Court case is proceeding on a relatively fast timeframe, as all of the parties agree that resolving the constitutionality of the ACA is important so that states can understand what is needed to plan for the implementation of the Medicaid expansion, assistance available through the exchanges, and other aspects of health reform scheduled to take effect in January, 2014. In early January 2012, the parties began filing with the Court their written arguments on each issue, and briefing will end in mid-March 2012. A number of *amicus* briefs, by organizations who are not parties to the case but who can provide additional helpful information to inform the Court's decisions, also are expected to be filed on both sides of the issues. The Court will then hear extensive oral argument on the case over three days, devoting one hour to the Anti-Injunction Act on March 26, 2012, two hours to the individual mandate on March 27, 2012, and an hour and a half to severability and one hour to the Medicaid expansion on March 28, 2012. Although there is no set timeframe within which the Court must act, it is likely to issue a written opinion before the close of the current term in June, 2012. Figure 1 depicts upcoming key dates in the case. As the case progresses at the Supreme Court, all of the filings will be posted at <http://www.supremecourt.gov/docket/PPAACA.aspx>.<sup>15</sup>



**Figure 1: Timeline of Key Dates in Supreme Court ACA Case**



This policy brief was prepared by MaryBeth Musumeci of the Kaiser Family Foundation’s Commission on Medicaid and the Uninsured. The author thanks Andy Schneider, consultant to the Kaiser Commission on Medicaid and the Uninsured, for his helpful comments.

**Endnotes**

<sup>1</sup> No. 11-398.  
<sup>2</sup> No. 11-400.  
<sup>3</sup> For more information about the ACA, see [www.healthreform.kff.org](http://www.healthreform.kff.org).  
<sup>4</sup> For more information about the Medicaid program’s required and optional elements, see Kaiser Commission on Medicaid and the Uninsured, *Federal Core Requirements and State Options in Medicaid: Current Policies and Key Issues* (April, 2011), available at <http://www.kff.org/medicaid/upload/8174.pdf>.  
<sup>5</sup> Letter from Douglas Elmendorf, Director, Cong. Budget Office to Hon. Nancy Pelosi, Speaker, U.S. House of Reps. (March 20, 2010), available at <http://www.cbo.gov/ftpdocs/113xx/doc11379/AmendReconProp.pdf>.  
<sup>6</sup> Two more individual plaintiffs recently were added to the case after one of the original individual plaintiffs closed her business and filed for bankruptcy, thereby calling into question whether she would be subject to the individual mandate.  
<sup>7</sup> The states joining Florida are Alabama, Alaska, Arizona, Colorado, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Mississippi, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming.  
<sup>8</sup> *State of Florida, et al. v. U.S. Dep’t of Health & Human Servs., et al.*, Nos. 11-11021 & 11-11067 (11<sup>th</sup> Cir., Aug. 12, 2011), available at <http://www.uscourts.gov/uscourts/courts/ca11/201111021.pdf>.

<sup>9</sup> *Susan Seven-Sky, et al. v. Eric H. Holder, Jr., et al.*, No. 11-5047 (D.C. Cir., Nov. 8, 2011), available at [http://www.cadc.uscourts.gov/internet/opinions.nsf/055C0349A6E85D7A8525794200579735/\\$file/11-5047-1340594.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/055C0349A6E85D7A8525794200579735/$file/11-5047-1340594.pdf).

<sup>10</sup> *Thomas More Univ. Law Center, et al. v. Obama, et al.*, No. 10-2388 (6<sup>th</sup> Cir. June 29, 2011), available at <http://www.ca6.uscourts.gov/opinions.pdf/11a0168p-06.pdf>.

<sup>11</sup> *Commonwealth of Va., et al. v. Sebelius et al.*, Nos. 11-1057, 11-1058 (4<sup>th</sup> Cir. Sept. 8, 2011), available at <http://pacer.ca4.uscourts.gov/opinion.pdf/111057.P.pdf>; *Liberty Univ., et al. v. Geithner, et al.*, No. 10-2347 (4<sup>th</sup> Cir. Sept. 8, 2011), available at <http://pacer.ca4.uscourts.gov/opinion.pdf/102347.P.pdf>.

<sup>12</sup> 26 U.S.C. § 7421(a).

<sup>13</sup> States that filed *amicus* briefs in support of the Medicaid expansion in the federal district court include Colorado, Iowa, Kentucky, Maryland, Michigan, Pennsylvania, Oregon, Vermont, and Washington. Note that in some states, the governor and the attorney general filed briefs on opposite sides.

<sup>14</sup> See also Drew Altman, Ph.D., President and CEO, Kaiser Family Foundation, *Pulling It Together, 2012: The ACA, and More* (Jan. 4, 2012), available at <http://www.kff.org/pullingittogether/2012.cfm>.

<sup>15</sup> Additional information and resources about the cases are available at the Supreme Court of the United States (SCOTUS) blog's health care page, <http://www.scotusblog.com/category/special-features/health-care/>.

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