

The Future of the Affordable Care Act

Thursday, November 12, 2020



The
Commonwealth
Fund

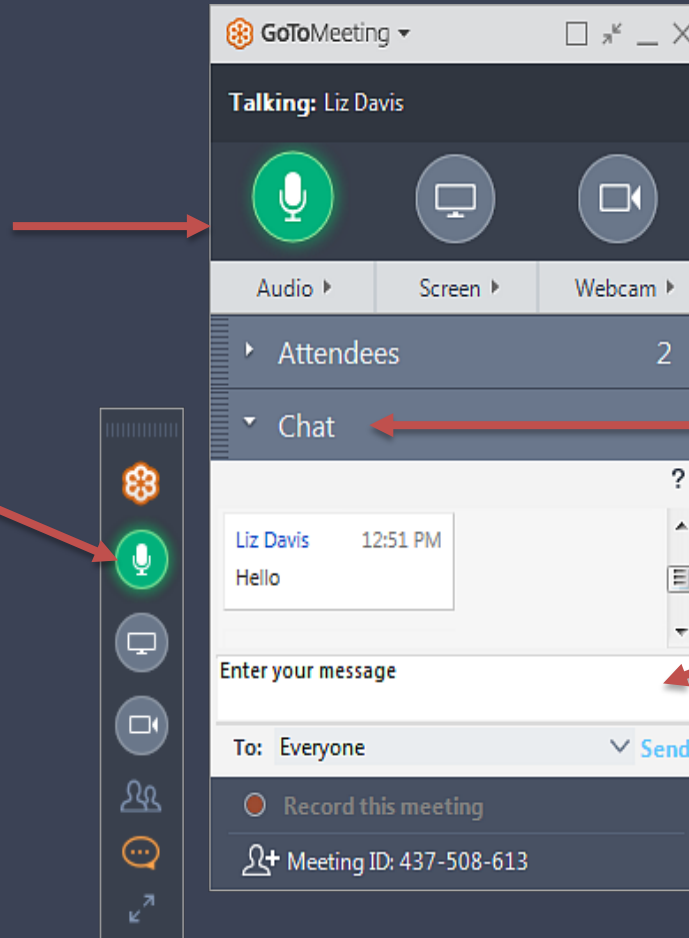


ALLIANCE
FOR HEALTH POLICY

 #AllHealthLive

Participating in the Webinar

To mute yourself, click either of the buttons with a microphone icon. The mic will have a line through it and turn orange when you are muted.



To ask a question click down on the Chat window and enter your text below, then hit send.

Materials

Visit www.allhealthpolicy.org

- Agenda and speaker bios
- Selected Resources List
- Selected Experts List
- Presentation Slides
- Recording (posted later)

Moderator:
Elizabeth Fowler, J.D., Ph.D.

@commonwealthfnd

Executive Vice President for Programs,
The Commonwealth Fund



Today's Panelists



Thomas R. Barker, J.D.

Partner, Foley Hoag, LPP,
Co-Chair, Healthcare Practice



Katie Keith, J.D., MPH

Professor, Georgetown University Law Center
Principal, Keith Policy Solutions, LLC



Sara Collins, Ph.D.

Vice President for Health Care Coverage and Access
The Commonwealth Fund
@commonwealthfnd



Jamila Michener, Ph.D.

Associate Professor, Department of Government,
Cornell University
@povertyscholar



#AllHealthLive



Katie Keith, J.D., MPH

Professor, Georgetown University Law Center
Principal, Keith Policy Solutions, LLC



CA v. TX

Overview

- 18 Republican AGs and governors
- 2 individuals in Texas
- Department of Justice



- 21 Democratic AGs and governors
- U.S. House of Representatives

Argument

- In 2012, the US Supreme Court upheld the ACA mandate as a tax
- In 2017, Congress eliminated the mandate penalty in the tax reform bill
- Without the penalty, the mandate is unconstitutional, and without a severability clause, the entire law should be struck down

Timeline

- Oral arguments on November 10th
- Decision in 2021 - as early as spring or as late as summer

CA v. TX

Potential Outcomes

Status Quo

- No standing/subject matter jurisdiction
- Mandate is unconstitutional
- Mandate is unconstitutional but severable

Some Disruption

- Preexisting condition protections struck down
- Title 1 of ACA is struck down

Major Disruption

- Entire ACA is struck down

Observations from Oral Argument

- Significant focus on standing and constitutionality – but no clear consensus
- Seemingly clear consensus that the mandate is severable from the rest of the ACA
 - “Here, Congress left the rest of the law intact when it lowered the penalty to zero. That seems to be compelling evidence on the question.” – **Chief Justice Roberts** to Texas
 - “I tend to agree with you that it's a very straightforward case for severability under our precedents, meaning that we would excise the mandate and leave the rest of the Act in place, reading our severability precedents.” - **Justice Kavanaugh** to House
 - “I think it's hard for you to argue that Congress intended the entire Act to fall if the mandate were struck down when the same Congress that lowered the penalty to zero did not even try to repeal the rest of the Act. I think, frankly, that they wanted the Court to do that. But that's not our job.” – **Chief Justice Roberts** to Texas
 - “Don't you think in 2017 -- in 2017, do you read Congress as having wanted to preserve protection for coverage for people with preexisting conditions? Because it sure seems that way from the -- the record and the text.” – **Justice Kavanaugh** to Texas

Sara Collins, Ph.D.

@commonwealthfnd

Vice President for Health Care Coverage and Access,
The Commonwealth Fund



What CA v. TX Means for U.S. Health Care

Alliance for Health Policy Briefing: The Future of the Affordable Care Act

Sara R. Collins, Ph.D., Vice President
Health Care Coverage and Access

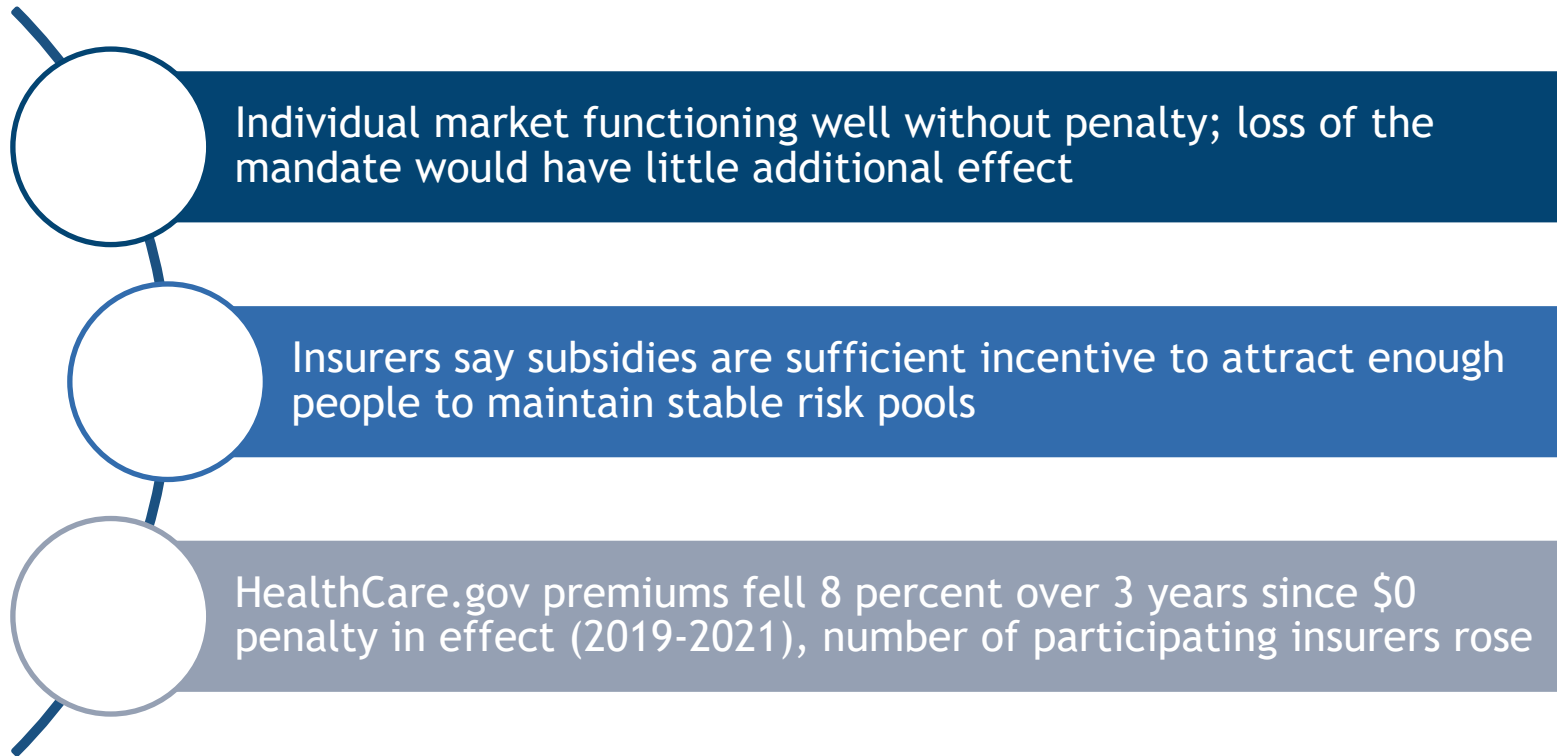
November 12, 2020



The
Commonwealth
Fund

Scenario One: Mandate Constitutional OR Unconstitutional and Severable from the ACA

The ACA will continue to function as it does now:



Scenario Two: Mandate Unconstitutional and Inseverable from Market Reforms

The individual market would look much like it did pre-ACA:

133 million nonelderly adults with preexisting health conditions, plus more than 3 million who had COVID-19, would no longer have preexisting condition protections

Young women, older people, and smokers would face higher premiums or be denied coverage

Few health plans would cover maternity care, or provide it at additional cost

Insurers and employers could place annual and lifetime limits on the amount they will pay, leaving people exposed to catastrophic costs

Insurance companies could cancel policies if someone became sick

Scenario Three: Mandate Unconstitutional and Inseverable from Entire ACA

In addition to the effects of Scenario Two:

21.1
MILLION

Additional people would become uninsured by 2022

15.5
MILLION

Adults and children with Medicaid and CHIP would lose their coverage

15
MILLION

People who have comprehensive coverage through the ACA marketplaces and individual market, including 9.3 million who receive premium subsidies, would lose their coverage

150+
MILLION

People with employer plans no longer entitled to free preventive care; would lose ability to keep children on policies to age 26

\$152
BILLION

In federal funding for health care lost by states

\$135
BILLION

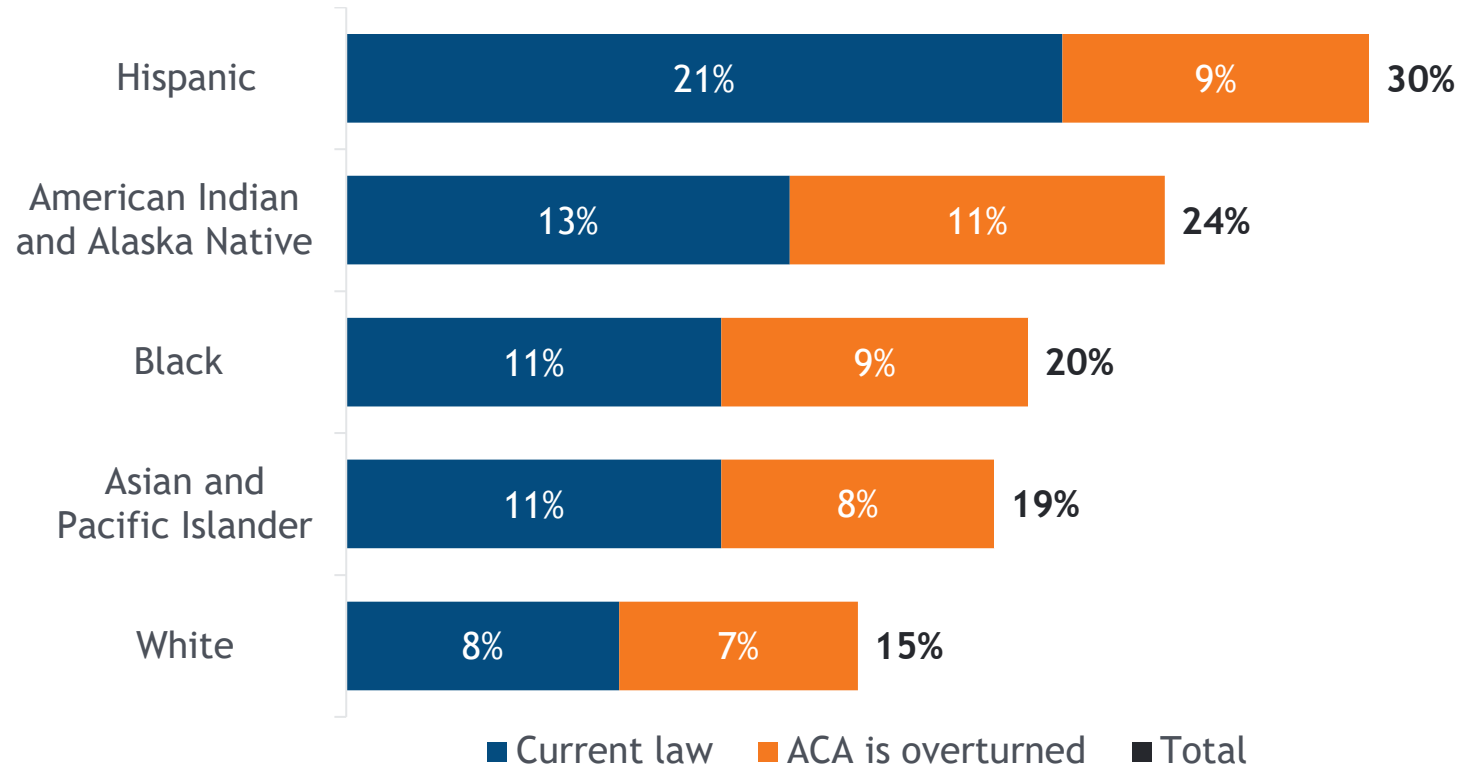
In insurer and patient spending lost by providers and health care manufacturers

\$58
BILLION

Increase in uncompensated care as more patients are uninsured

Uninsured rates will climb for all racial and ethnic groups

Percent of uninsured nonelderly population if the ACA is overturned, by race and ethnicity, 2022



Source: Linda J. Blumberg et al., "The Potential Effects of a Supreme Court Decision to Overturn the Affordable Care Act: Updated Estimates," Urban Institute, Oct. 15, 2020.

Implications extend beyond insurance coverage – ACA has touched every corner of the health care industry

The ACA affected people with every type of insurance coverage

- Restructured individual and small-group insurance markets
- Expanded and streamlined Medicaid program
- Improved Medicare benefits
- States rewrote laws to incorporate the ACA

The law reformed payment structures and the delivery system

- Reformed how Medicare pays providers
- Catalyst towards value-based care
- Created regulatory pathway for biosimilars
- Insurers, hospitals, physicians, and state and local governments have invested billions of dollars adjusting to these changes

Thank you!



Gabriella Aboulafia
Program Assistant, Health
Care Coverage & Access



Jesse Baumgartner
Research Associate, HCCA and Tracking
Health System Performance



Munira Gunja
Senior Researcher, Health
Care Coverage & Access



David Radley
Senior Scientist, Tracking Health
System Performance

Jamila Michener, Ph.D.

@povertyscholar

Associate Professor,
Department of Government, Cornell University



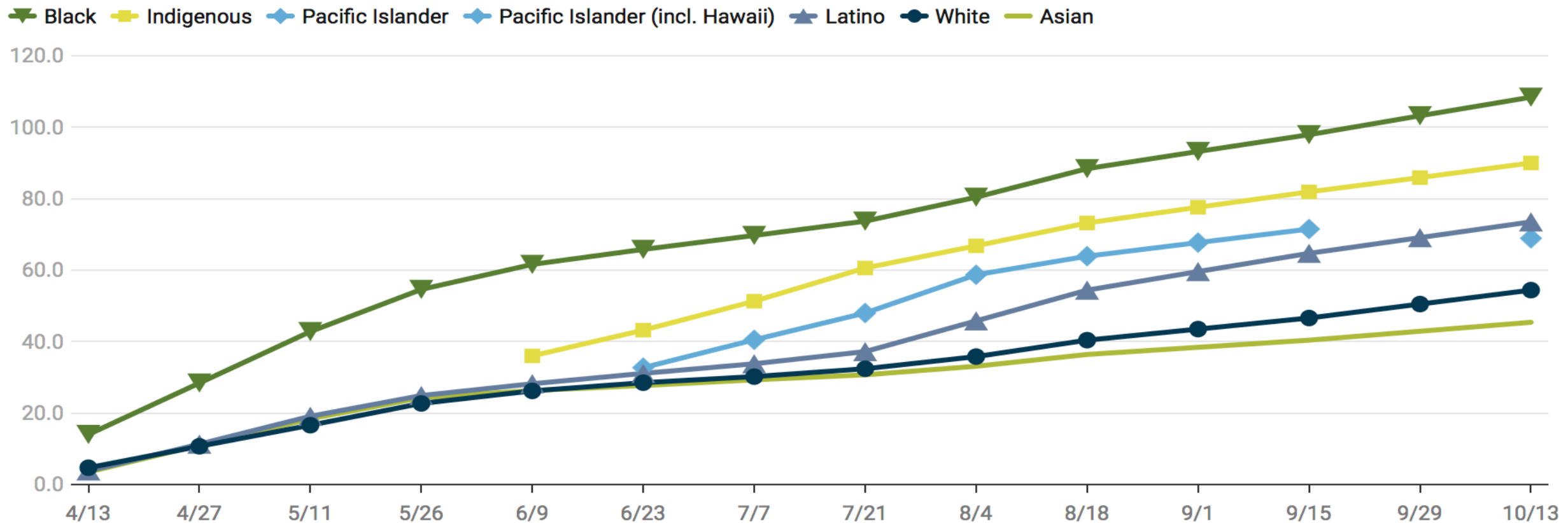
The Racial Equity Implications of California v. Texas

Jamila Michener, PhD
Cornell University

The Urgency of Equity

Black & Indigenous Americans experience highest death tolls from COVID-19

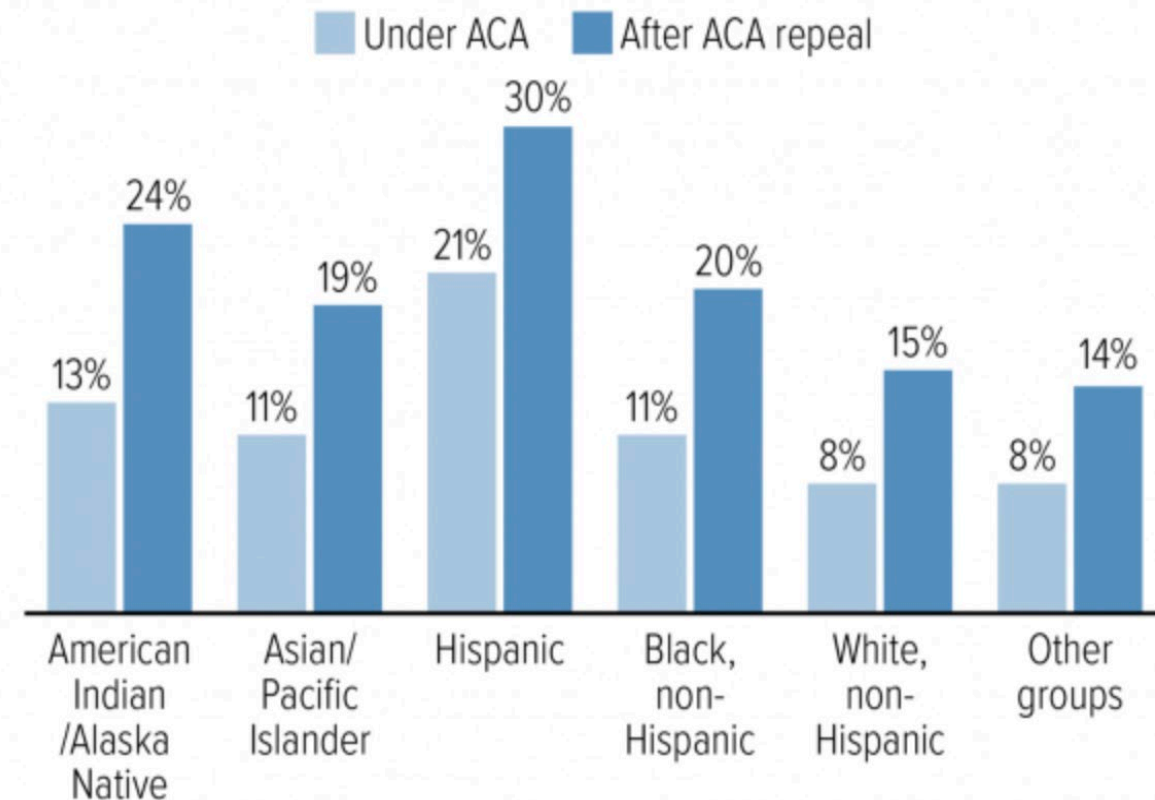
Cumulative actual COVID-19 mortality rates per 100,000, by race and ethnicity, April 13-Oct. 13, 2020



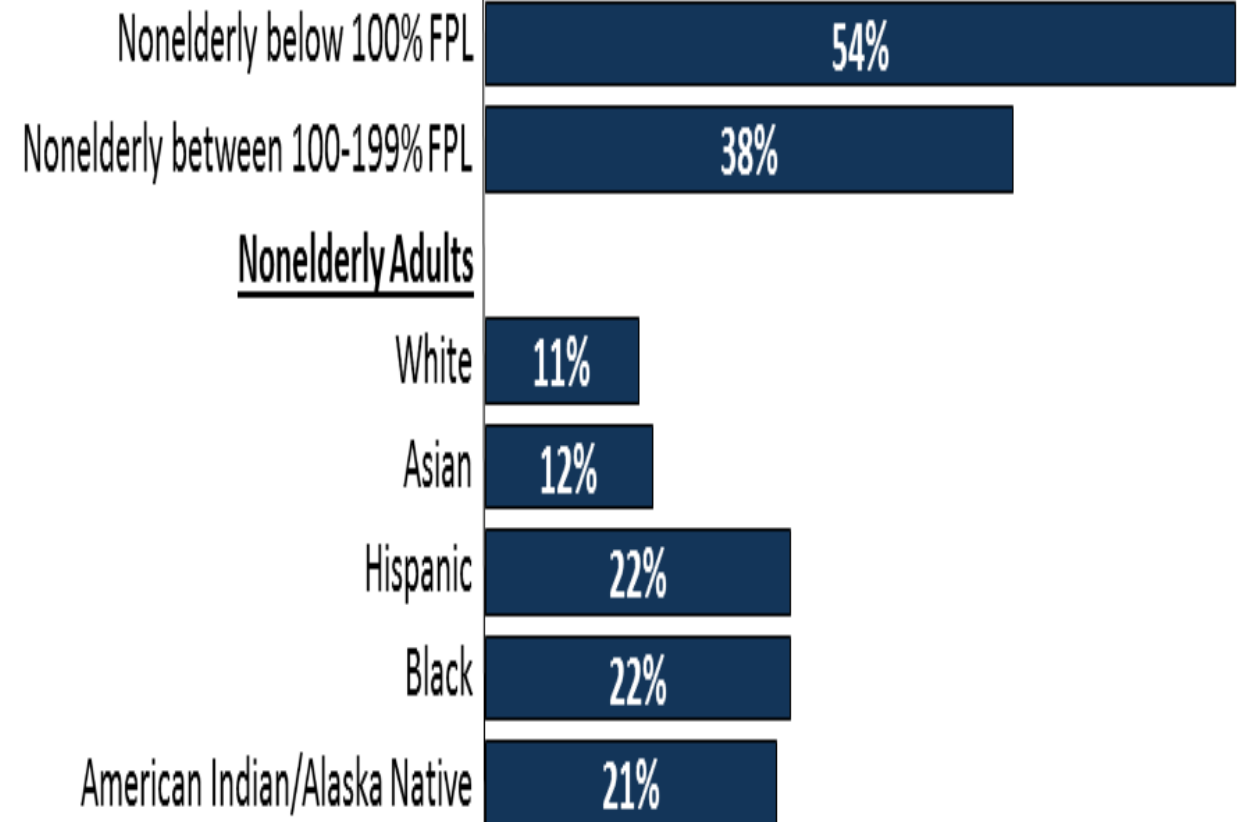
ACA & Racial Equity

ACA Repeal Would Cause Large Coverage Losses and Widen Racial Gaps

Uninsured rate among non-elderly people, projected for 2022

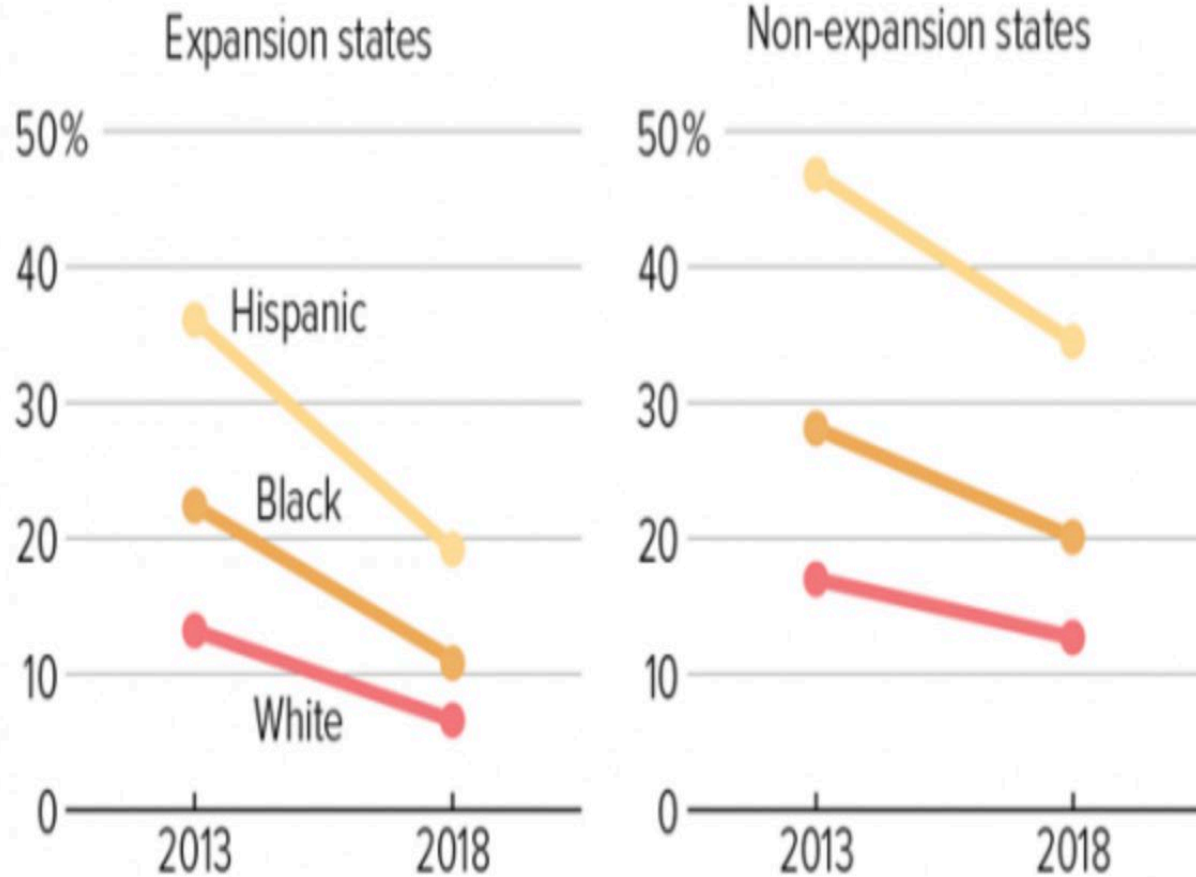


Percent with Medicaid Coverage

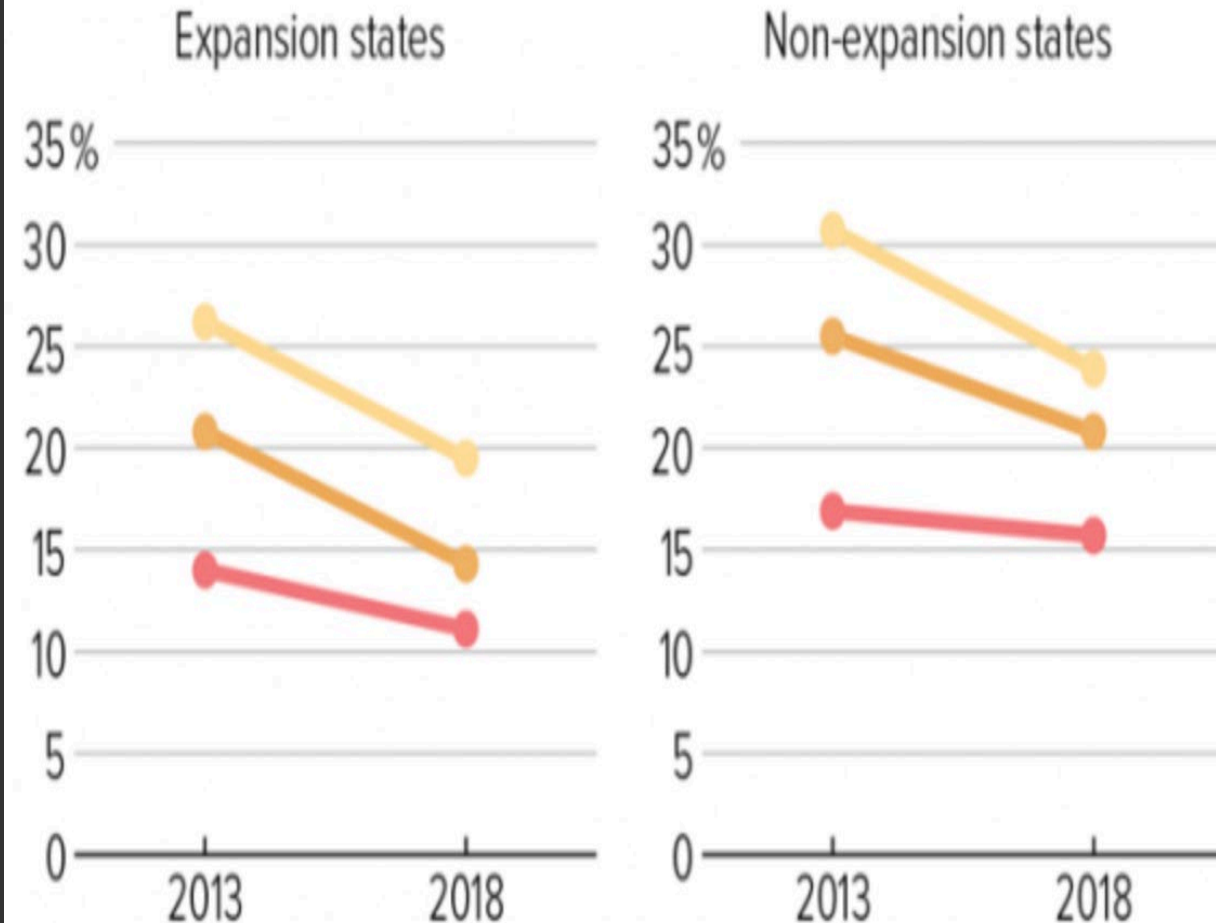


Medicaid Expansion & Racial Inequity

Uninsured rate, adults (ages 18-64)



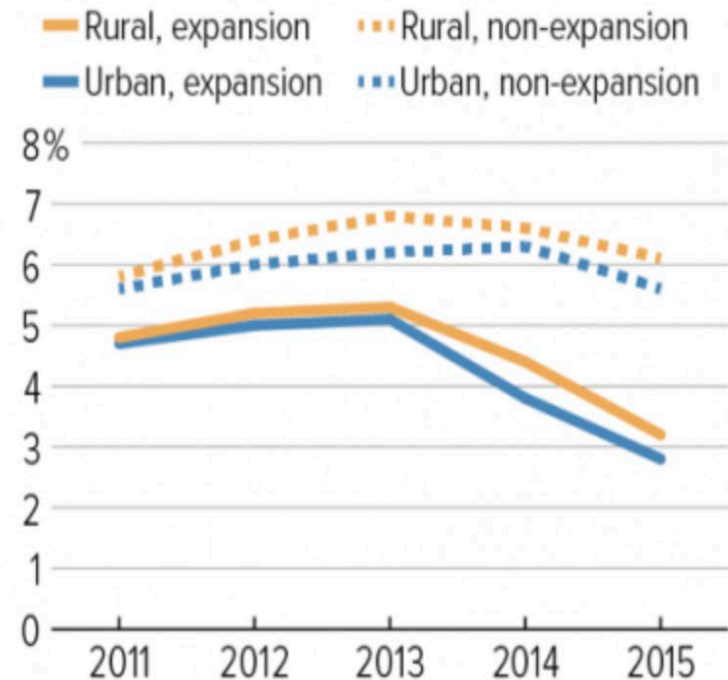
Share of adults avoiding medical care due to cost



Medicaid Expansion Ripple Effects

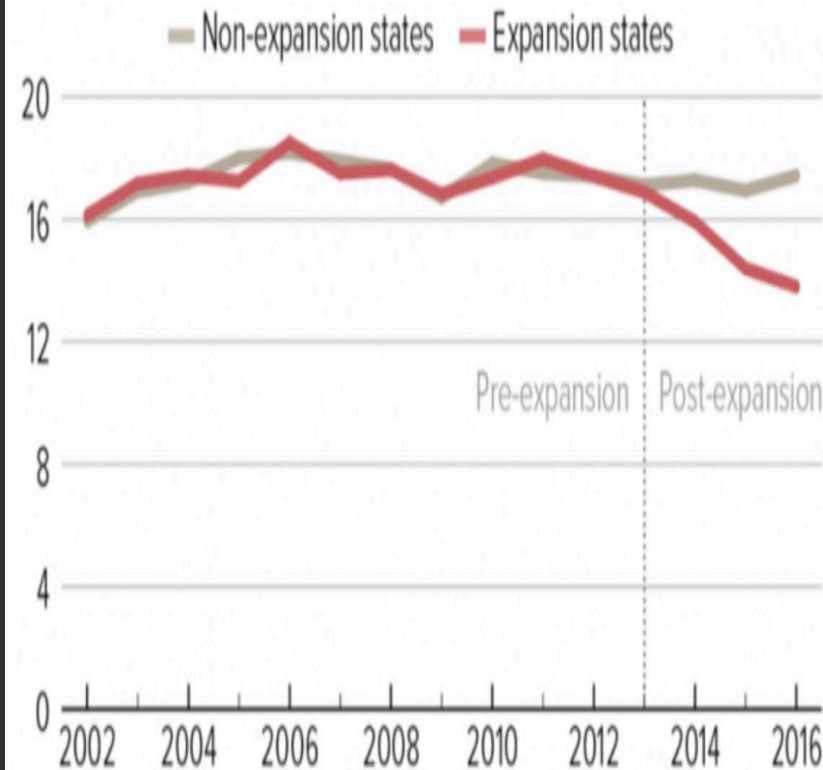
Medicaid Expansion Reduces Hospitals' Uncompensated Care Burden

Uncompensated care as share of total hospital expenses, by state Medicaid expansion status

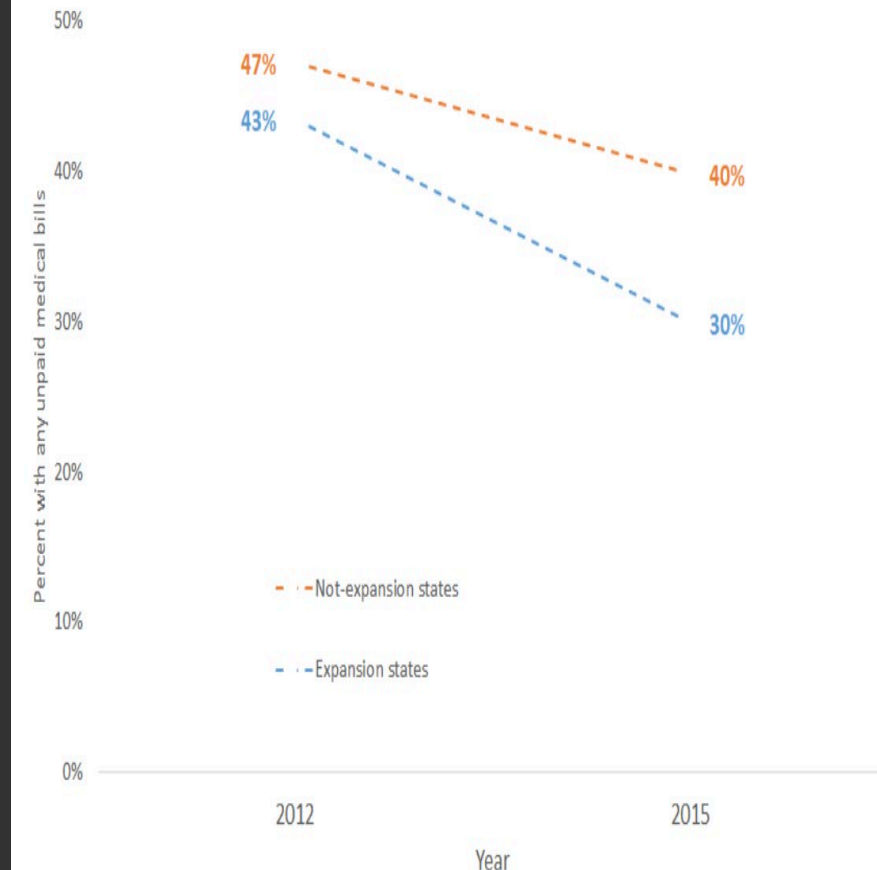


Evictions Fell Sharply in Medicaid Expansion States

Evictions per 1,000 renter-occupied households



PERCENT OF LOW-INCOME ADULTS WITH UNPAID MEDICAL BILLS BY YEAR AND STATE MEDICAID-EXPANSION STATUS



Thomas R. Barker, J.D.

Partner,
Foley Hoag, LPP,
Co-Chair, Healthcare Practice



SCENARIOS/AFFECTED PARTIES	SCOTUS dismisses based on lack of standing	SCOTUS finds individual mandate severable	SCOTUS invalidates Title I of the ACA	SCOTUS invalidates ACA in its entirety
TRUMP ADMINISTRATION (Assumes Court acts by January 20)	Angry tweets. Likely insufficient time remaining to adopt regulatory policies to affect 2021 enrollments or 2022 plan year.	Angry tweets.	Tweets of vindication. May attempt to address loss of coverage for individuals in individual market with pre-existing conditions.	Tweets of vindication. Loss of ability to implement any policies using CMMI (e.g., radiation oncology demo; IPI for drug pricing).
BIDEN ADMINISTRATION	Likely no action necessary; likely statement reinforcing the importance of the ACA. Potential political impetus for “public option.”	Unlikely that Administration would support a legislative solution (if there were to be one); arguments seemed to suggest that the effective lack of an individual mandate has not damaged insurance markets in any event.	Could encourage Congress to re-enact the § 5000(b) penalty (or at least a nominal penalty to preserve the taxation basis for the mandate).	Could encourage Congress to re-enact the § 5000(b) penalty (or at least a nominal penalty to preserve the taxation basis for the mandate).

SCENARIOS/AFFECTED PARTIES	SCOTUS dismisses based on lack of standing	SCOTUS finds individual mandate severable	SCOTUS invalidates Title I of the ACA	SCOTUS invalidates ACA in its entirety
CONGRESS	No action.	No action.	Congress unlikely to reinstate § 5000A(b) penalty.	Congress unlikely to reinstate § 5000A(b) penalty.
			<p>At the very least, there appears to be bipartisan support for enacting some form of protection for pre-existing conditions.</p> <p>However, re-enacting subsidies would be politically difficult.</p> <p>Other Title I provisions (e.g., rating reform, definition of qualified health plan, establishing Exchanges, employer mandate) also have political consequences and may be politically unsustainable in a closely divided Congress.</p>	<p>The implications of a complete repeal of the ACA go far beyond title I and affect Medicare, Medicaid, public health programs, 340B. Congress would likely re-enact significant parts of the ACA that aren't typically considered "Obamacare."</p> <p>Examples: CMMI, Medicare and Medicaid payment policy, 340B expansion, quality payment initiatives, Medicare Advantage payment policy.</p> <p>Difficult to see how Medicaid expansion could be re-enacted given current make-up of Congress.</p>

SCENARIOS/AFFECTED PARTIES	SCOTUS dismisses based on lack of standing	SCOTUS finds individual mandate severable	SCOTUS invalidates Title I of the ACA	SCOTUS invalidates ACA in its entirety
STATES	No action necessary	No action necessary	<p>States would have to consider enactment of pre-existing condition exclusions and rating reform in the individual market; unlikely that all 50 states would be able to do so.</p> <p>Some States might create their own Exchanges and subsidy programs, although COVID has negatively affected State revenues.</p> <p>Some States might enact employer mandates.</p>	<p>States would have little ability to influence programs such as Medicare, 340B, federal payment reform, and are precluded from regulating ERISA plans.</p> <p>States would have to evaluate how to address coverage of childless adults and parents in Medicaid expansion states, as well as loss of enhanced match.</p>

Discussion



Thomas R. Barker, J.D.

Partner, Foley Hoag, LPP,
Co-Chair, Healthcare Practice



Katie Keith, J.D., MPH

Professor, Georgetown University Law Center
Principal, Keith Policy Solutions, LLC



Sara Collins, Ph.D.

Vice President for Health Care Coverage and Access
The Commonwealth Fund
@commonwealthfnd



Jamila Michener, Ph.D.

Associate Professor, Department of Government,
Cornell University
@povertyscholar

We value your input!

Please fill out the evaluation survey you will receive immediately after this presentation and by email this afternoon!



ALLIANCE

FOR HEALTH POLICY

www.allhealthpolicy.org

1444 Eye St NW, Suite 910
Washington, D.C., 20005