The Future of the Affordable Care Act

Thursday, November 12, 2020
Participating in the Webinar

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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.
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Executive Vice President for Programs,
The Commonwealth Fund
Today’s Panelists

Thomas R. Barker, J.D.
Partner, Foley Hoag, LPP,
Co-Chair, Healthcare Practice

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Vice President for Health Care Coverage and Access
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#AllHealthLive
CA v. TX
Overview

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 10\textsuperscript{th}
• 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

For a deeper dive, check out: https://www.healthaffairs.org/do/10.1377/hblog20201111.916623/full/
Sara Collins, Ph.D.
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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
EXHIBIT 1

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

The ACA will continue to function as it does now:

1. Individual market functioning well without penalty; loss of the mandate would have little additional effect

2. Insurers say subsidies are sufficient incentive to attract enough people to maintain stable risk pools

3. HealthCare.gov premiums fell 8 percent over 3 years since $0 penalty in effect (2019-2021), number of participating insurers rose

Source: Sara R Collins and Gabriella N. Aboulafia, “As Millions of Americans Seek ACA Coverage, Republicans Aim to Overturn the Law at the U.S. Supreme Court,” To the Point (blog), Commonwealth Fund, Nov. 9, 2020.
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.

Source: Sara R Collins and Gabriella N. Aboulafia, “As Millions of Americans Seek ACA Coverage, Republicans Aim to Overturn the Law at the U.S. Supreme Court,” To the Point (blog), Commonwealth Fund, Nov. 9, 2020.
EXHIBIT 3

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

Source: Sara R Collins and Gabriella N. Aboulafia, “As Millions of Americans Seek ACA Coverage, Republicans Aim to Overturn the Law at the U.S. Supreme Court,” To the Point (blog), Commonwealth Fund, Nov. 9, 2020.
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

<table>
<thead>
<tr>
<th>Race/Ethnicity</th>
<th>Current law</th>
<th>ACA is overturned</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hispanic</td>
<td>21%</td>
<td>9%</td>
<td>30%</td>
</tr>
<tr>
<td>American Indian and Alaska Native</td>
<td>13%</td>
<td>11%</td>
<td>24%</td>
</tr>
<tr>
<td>Black</td>
<td>11%</td>
<td>9%</td>
<td>20%</td>
</tr>
<tr>
<td>Asian and Pacific Islander</td>
<td>11%</td>
<td>8%</td>
<td>19%</td>
</tr>
<tr>
<td>White</td>
<td>8%</td>
<td>7%</td>
<td>15%</td>
</tr>
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</table>

EXHIBIT 5

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

Source: Sara R Collins and Gabriella N. Aboulafia, “As Millions of Americans Seek ACA Coverage, Republicans Aim to Overturn the Law at the U.S. Supreme Court,” To the Point (blog), Commonwealth Fund, Nov. 9, 2020.
Thank you!

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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

- Black
- Indigenous
- Pacific Islander
- Pacific Islander (incl. Hawaii)
- Latino
- White
- Asian
ACA & Racial Equity

ACA Repeal Would Cause Large Coverage Losses and Widen Racial Gaps
Uninsured rate among non-elderly people, projected for 2022

<table>
<thead>
<tr>
<th>Group</th>
<th>Before ACA (%)</th>
<th>After ACA (%)</th>
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<tbody>
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<td>American Indian/Alaska Native</td>
<td>13%</td>
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</tr>
<tr>
<td>White, non-Hispanic</td>
<td>8%</td>
<td>15%</td>
</tr>
<tr>
<td>Other groups</td>
<td>8%</td>
<td>14%</td>
</tr>
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Percent with Medicaid Coverage

- Nonelderly below 100% FPL: 54%
- Nonelderly between 100-199% FPL: 38%

Nonelderly Adults
- White: 11%
- Asian: 12%
- Hispanic: 22%
- Black: 22%
- American Indian/Alaska Native: 21%
Medicaid Expansion & Racial Inequity

Uninsured rate, adults (ages 18-64)

- Expansion states
- Non-expansion states

Share of adults avoiding medical care due to cost

- Expansion states
- Non-expansion states
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

Pre-expansion Post-expansion

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
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<th>SCOTUS dismisses based on lack of standing</th>
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<td>(Assumes Court acts by January 20)</td>
<td>Likely insufficient time remaining to adopt regulatory policies to affect 2021 enrollments or 2022 plan year.</td>
<td>May attempt to address loss of coverage for individuals in individual market with pre-existing conditions.</td>
<td>Loss of ability to implement any policies using CMMI (e.g., radiation oncology demo; IPI for drug pricing).</td>
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<td><strong>BIDEN ADMINISTRATION</strong></td>
<td>Likely no action necessary; likely statement reinforcing the importance of the ACA. Potential political impetus for “public option.”</td>
<td>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.</td>
<td>Could encourage Congress to re-enact the § 5000(b) penalty (or at least a nominal penalty to preserve the taxation basis for the mandate).</td>
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<td>CONGRESS</td>
<td>No action.</td>
<td>No action.</td>
<td>Congress unlikely to reinstate §5000A(b) penalty.</td>
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At the very least, there appears to be bipartisan support for enacting some form of protection for pre-existing conditions.

However, re-enacting subsidies would be politically difficult.

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.

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.”

Examples: CMMI, Medicare and Medicaid payment policy, 340B expansion, quality payment initiatives, Medicare Advantage payment policy.

Difficult to see how Medicaid expansion could be re-enacted given current make-up of Congress.
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<td>STATES</td>
<td>No action necessary</td>
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<td>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. Some States might create their own Exchanges and subsidy programs, although COVID has negatively affected State revenues. Some States might enact employer mandates.</td>
<td>States would have little ability to influence programs such as Medicare, 340B, federal payment reform, and are precluded from regulating ERISA plans. 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.</td>
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