

# HERE WE GO AGAIN: COULD THE ACA BE STRUCK DOWN?

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The Affordable Care Act has been peppered with lawsuits since its inception. The law was only hours old when the first lawsuit, challenging its constitutionality, was filed in federal district court. President Barack Obama signed the ACA into law on March 23, 2010, and that same day, 14 state attorneys general asked the U.S. District Court for the Northern District of Florida to nullify the law. They were later joined by private entities and 12 other states. Since then, lawsuits have challenged several aspects of the law, including the contraception mandate, payment of premium tax subsidies by federal health exchanges and payments to insurance companies, at least six of which have made it all the way to the U.S. Supreme Court. Through it all, the ACA has endured, providing access to health care for tens of millions of people through the health insurance exchanges and, in states that took up the ACA expansion, the Medicaid program.

But in January 2020, we were back where we started: the Supreme Court was again asked to hear a case that could overturn the entire law as unconstitutional. The court refused an expedited appeal but could still decide, as soon as this spring, to hear the case. Or it will send the parties to the lower court for further consideration and to begin the climb back up to the Supreme Court once again.

To understand the current challenge, we have to go back to the beginning. The initial lawsuit claimed that Congress did not have the constitutional authority to require people to purchase health insurance, which it did by creating a federal mandate for all U.S. citizens and lawfully present immigrants to have insurance and imposing a penalty on those who did not comply. This argument is based on Article I of the Constitution, which sets out the powers of Congress; if a congressional action exceeds those limits, it is unconstitutional. But also under Article I, Congress can regulate interstate commerce and it can levy and collect taxes. The Supreme Court agreed with the states that the commerce clause does not give Congress the

authority to impose a mandate to buy insurance. But the Court ruled that Congress does have the power to tax people if they do not have health insurance, and it upheld the constitutionality of the ACA because the penalty was basically a tax. In

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the same case, the Supreme Court also found that Congress does not have the power to order states to expand Medicaid, turning the ACA's Medicaid expansion into a state option.

Opposition to the ACA continued, despite its success in expanding health coverage. Congressional Republicans tried and failed many times to repeal all or part of the ACA. But in December 2017, the penalty for not having health insurance was repealed in the tax overhaul bill known as the

Tax Cuts and Jobs Act of 2017. The individual mandate remains but is unenforceable.

On February 28, 2018, Republican attorneys general and governors from 20 states sued the federal government, arguing that the repeal of just the penalty but not the mandate renders the entire law unconstitutional. Their theory is that because the mandate by itself is unconstitutional and because the mandate is essential to and unseverable from the operation of the entire ACA, the whole law must be overturned. U.S. District Judge Reed O'Connor of the Northern District of Texas agreed, finding that the ACA must be nullified but allowing it to remain in force while the case is appealed.

The Fifth Circuit Court of Appeals heard oral arguments on the case in July 2019. By then, the courts had permitted 21 Democratic state attorneys general and the House of Representatives to join the case to defend the law, as President Donald Trump's administration had largely agreed with the positions taken by the states challenging the ACA. The Fifth Circuit issued its decision on December 18, 2019, agreeing with the lower court that the individual mandate is unconstitutional but sending the case back to that court on the question of severability — that is, whether the unconstitutional mandate can be severed from the ACA or is so central to the law that the entire ACA must be struck down. The House of Representatives and Democratic state attorneys general have appealed that decision to the Supreme Court and asked it to consider the case on an expedited basis. The court could: agree to take up the case during its current term; agree to hear it in the term that begins in the fall; or let Judge O'Connor examine the question of severability. If it goes back to Judge O'Connor — and his earlier opinion makes it pretty clear that he does not think the mandate is severable — his decision will be appealed back to the Fifth Circuit and then on up to the Supreme Court. It might be this summer, it might be next summer, it might be in 2022 or 2023 — but the Supreme Court will once again have to rule on whether the ACA can continue or whether some or all of it must be abandoned.

The stakes are enormous. Overturning the ACA means the health exchanges would cease to exist. Premium and cost-sharing subsidies would end, as would Medicaid expansion. About 20 million people would lose their health care coverage,<sup>1</sup> and millions more would face much higher costs. Insurance companies would again be able to deny coverage for pre-existing conditions and

impose annual and lifetime limits on coverage. Young people would be kicked off their parents' insurance plans. But the ACA did not just address insurance coverage. If the ACA goes away, so does the legal authority for Accountable Care Organizations, the Center for Medicare & Medicaid Innovation and the shift to value-based payment in Medicare. The Kaiser Family Foundation details what else could be lost.<sup>2</sup>

The Catholic Health Association has been actively weighing in on the litigation. At each step — district court, appeals court and now Supreme Court — we have joined with other hospital associations to file briefs, arguing that the mandate is severable. Congress made its intent clear that the ACA can and should continue without the mandate when it repealed only the penalty. Both Congressional Budget Office projections of the impact of repealing the penalty<sup>3</sup> and the continued strength of the ACA since the penalty was repealed demonstrate that it is not essential to the structure of the law.<sup>4</sup> Furthermore, Congress could not have intended that losing the mandate would overturn the entire ACA, given the catastrophic results of such an action.

CHA will continue to follow this litigation closely and actively work to protect the health gains realized by tens of millions of Americans, thanks to the ACA.

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#### NOTES

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2. "Potential Impact of Texas v. U.S. Decision on Key Provisions of the Affordable Care Act," Kaiser Family Foundation, <https://www.kff.org/health-reform/fact-sheet/potential-impact-of-texas-v-u-s-decision-on-key-provisions-of-the-affordable-care-act/>.
3. Alexandra Minicozzi, "Modeling the Effects of the Individual Mandate on Health Insurance Coverage," Presentation at the 2017 Annual Meeting of the American Academy of Actuaries, <https://www.cbo.gov/system/files/115th-congress-2017-2018/presentation/53310-presentation.pdf>.
4. "Individual Insurance Market Performance in Late 2019," Kaiser Family Foundation, <https://www.kff.org/private-insurance/issue-brief/individual-insurance-market-performance-in-late-2019/>.

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