



MEMORANDUM

Date: November 12, 2020

To: REDC

From: Center Road Solutions

RE: Kaiser Family Foundation: “The *California v. Texas* Supreme Court Case and Its Implications for the ACA”

On November 9, 2020 the Kaiser Family Foundation (KFF) held a web briefing to shed light on the legal issues and ramifications behind *California v. Texas*, a hotly debated lawsuit regarding the ACA that the Court heard on November 10. The discussion highlights how the ACA has protected people with pre-existing conditions and has helped make coverage affordable for low- and moderate-income Americans, while also considering how the new administration may change the course of the lawsuit.

Key Takeaways:

- *California v. Texas* challenges the constitutionality of the individual mandate of the ACA.
- The question largely hinges on the severability of the individual mandate from the rest of the law.
- If the Court invalidates all or most of the law, the economic and infrastructure ramifications on the healthcare industry could be disastrous.

Introduction

Larry Levitt, KFF Executive Vice President for Health Policy

- *California v. Texas* challenges the ACA’s minimum essential coverage provision (known as the individual mandate) and questions whether that provision can be separated from the entire law. It started out as a legal longshot, but now it is in front of a newly configured Supreme Court. Congress could make this case moot, but party control of the Senate is still up in the air.
- The individual mandate requires that most people maintain a minimum level of health insurance coverage; those who do not must pay a financial penalty.
- The 2017 Tax Cuts and Jobs Act set the financial penalty at zero dollars, and the U.S. Court of Appeals for the 5th Circuit affirmed that the individual mandate is no longer constitutional because the financial penalty no longer “produces at least some revenue” for the federal government.

Presentations

MaryBeth Musumeci, Associate Director of the Program on Medicaid and the Uninsured

- 17 states, led by California, were allowed to intervene in the case and defend the ACA. Later, four more states joined in to intervene on appeal. There are 18 state plaintiffs, led by Texas, challenging the ACA along with two individual plaintiffs.
- The federal government is not defending the ACA in this lawsuit. It is unusual for the federal government to not defend the constitutionality of a federal law.
- There are several questions regarding standing, constitutionality, and severability of the individual mandate to the rest of the ACA. The lawsuit also questions whether the federal government should be prohibited from enforcing non-severable provisions nationwide, deciding whether the entire ACA could be struck down.

Robin Rudowitz, Vice President and Co-Director of the Program on Medicaid and the Uninsured

- The ACA Medicaid expansion was designed to fill the gaps in Medicaid coverage with improved federal matching funds. Prior to the ACA, Medicaid eligibility was limited to specific low-income groups such as children and the elderly.
- 39 states, including DC, have adopted the ACA Medicaid expansion, but eligibility remains limited in 12 states that have not.

- Studies generally find positive effects of the expansion on outcomes such as access and utilization of care, insurance coverage, payer mix, and health care affordability and financial security.
- If the ACA is overturned, at least 15 million adults currently covered by Medicaid lose a federal pathway to eligibility.
- States would lose nearly \$80 billion in enhanced federal matching funds for expansion adults.
- Most adults who lose Medicaid coverage would likely become uninsured, as people who lose their jobs due to the economic downturn have fewer coverage options.

Cynthia Cox, Vice President and Director of the Program on the ACA

- 27% of non-elderly adults in the United States have a pre-existing condition that would've left them uninsurable in the pre-ACA individual market.
- Before the ACA, insurers in this market would not cover those with heart conditions, diabetes, cancer, or even pregnant women. Recent COVID-19 diagnoses could also be considered pre-existing conditions, so the statistic would theoretically be a lot larger than 27%.
- The COVID-19 pandemic has shown us how fragile job-based coverage can be.
- If the ACA is overturned, states would be unable to replace federal funding needed to make pre-existing protections affordable.
- If the ACA is overturned without a replacement plan, this would send the healthcare system into chaos. Millions of people would lose coverage and the health industry, which is almost 20% of the U.S. economy, will need to rethink how they do business.

Question & Answer

Question 1: How many of the state plaintiffs challenging the ACA are states that have chosen the Medicaid expansion under the law?

Musumeci: Nine of the 18 state plaintiffs have adopted the Medicaid expansion. Despite having adopted this expansion, these states are all taking the position that the entire ACA, including the Medicaid expansion, should be struck down.

Question 2: How can Congress make this case moot and how do the Georgia runoffs affect that?

Levitt: There are three simple fixes. One would be to repeal the individual mandate entirely. The second would be to make the individual mandate constitutional once again, based on the Court's previous decision by adding a small tax penalty to the mandate. The third would be to clarify that the rest of the ACA is severable from the individual mandate. However, even if a Democrat majority Senate is formed, it'd be difficult to accomplish the second and third fixes as they'd need 60 votes to end the filibuster. On top of this, the control of the Senate is still up in the air with the runoffs in Georgia.

Question 3: How has the Republican opposition to the ACA developed over time?

Kirzinger: From its inception, Republicans and Republican voters have largely disapproved the ACA. Republican voters say they do not want to see the Court overturn protections for people with pre-existing conditions. However, when it comes to overturning the ACA, Republican voters still largely want to see it happen.

Question 4: How have the pandemic and the economic crisis affected enrollment in ACA plans?

Rudowitz: The data that we have is preliminary through July. It is showing about a 6% increase in Medicaid enrollment, and that's around 4 million new people under Medicaid coverage.