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Deliver Us from *Texas*: As the ACA Turns 10, Will the Supreme Court Step Up Again?

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As the 10th anniversary of the Affordable Care Act approaches, it is a wonder that the sweeping reform law is still on the books. In 2012 and 2015, the U.S. Supreme Court defused legal challenges with decisions in two separate cases, though the decision in the latter case allowed states to opt out of the Medicaid expansion included in the law.[1] Two years later, the late U.S. Senator John McCain's memorable "thumbs-down" vote[2] put an abrupt end to months of effort by Republican majorities in Congress to repeal the law. Until recently, New York and other states that have embraced the ACA have only had to contend with destabilizing regulations and funding cuts advanced by the Trump administration. But now, an increasingly worrisome constitutional challenge to the ACA has worked its way through federal courts,[3] and the U.S. Supreme Court has agreed to consider intervening in the case at a conference of the nine justices scheduled for February 21, 2020.[4] As that momentous discussion approaches, it's a good time to look at how we got here, and review the damage that might be headed our way in terms of the ACA tools New York has relied on to drive its uninsurance rate to historically low levels.

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The request to the Supreme Court to intervene in the case came from a coalition of state attorneys general (including New York's) and the U.S. House of Representatives, who stepped up when the U.S. Department of Justice refused to defend a lawsuit challenging the ACA on constitutional grounds (*Texas v. United States*)[5] and later endorsed the lower court decision to throw out the ACA.[6] The original case was brought by the attorney general from Texas and 19 other states, led by Republican attorneys general or governors, in February 2018; at the time, legal analysts didn't give the lawsuit much of a chance.[7] Texas's argument—that because an earlier Supreme Court decision upheld the ACA on the grounds that the individual mandate was a tax, when Congress "zeroed out" the tax penalty in 2017 it made the entire law unconstitutional—seemed to have an easy answer: if Congress had meant to repeal the ACA, it could have explicitly done so. But a federal judge sided with Texas in the first round,[8] striking down the entire law. A federal appeals court upheld the earlier decision in part,[9] agreeing that the individual mandate was unconstitutional but asking the lower court to take a "finer tooth comb" to the sweeping law to determine what parts, if any, could stand. As that process plays out, ACA supporters have been highlighting what Texas's success in the case would mean.

"Pre-existing conditions" is the current shorthand for the main impact of ACA repeal. Allowing health plans to once again deny coverage or charge higher rates to individuals with known medical conditions is certainly a vital concern that resonates with consumers; but as a descriptor for ACA repeal, the term understates the havoc that would ensue for states in terms of coverage, financing, and other consumer protections. An analysis by the Urban Institute estimates that repealing the ACA would increase the number of uninsured by nearly 20 million nationally—with about 75 percent of that decline representing lost Child Health Plus and Medicaid coverage—and decrease federal spending on health care by almost $135 billion.[10] And there's a long list of important consumer protections and initiatives besides pre-existing conditions that would be swept from the books: comprehensive health benefits, free preventive care, equal rates for men and women, caps on premiums for older enrollees, bans on annual and lifetime dollar limits, caps on out-of-pocket expenses, decreases in drug spending for Medicare recipients, coverage for children up to age 26 through their parents' plans, demonstration programs to improve quality and reduce costs, and even calorie counts on restaurant menus.[11]

Just as the ACA's effect varied by state, so too would its repeal. These effects would depend on the state's health care coverage and regulatory landscape before ACA implementation, the degree to which it embraced ACA tools, and the limits of state regulation—even in states with active, pro-consumer regulators like New York. New York had many ACA provisions already in place such as community rating and open enrollment, and it added others, like enshrining ACA essential health benefits in statute. But state insurance regulation is limited to the fully insured market (which covers only about half of the roughly 9 million New Yorkers with job-based coverage),[12] so many important ACA protections for workers covered under the self-insured arrangements common at big companies would depend on decisions by their employers.[13]

New York also moved quickly last year to strengthen the pre-existing condition protections it had in place before the ACA,[14] but the loss of over $600 million in tax credits for individuals[15]—on top of zeroing out the individual mandate penalty—would likely destabilize the rejuvenated market. Without the affordability credits, enrollment would decline, the risk pool would deteriorate,

and premiums would rise, triggering the devolution of market segment to its formerly dysfunctional state. By the same token, the loss of a projected $4.8 billion in tax credits[16] repurposed to cover nearly 800,000 New Yorkers in the Essential Plan, New York's ACA Basic Health Program option, would mean the end to one of the nation's best experiments at reaching low-income workers.

Of course, New York could take a deep breath and simply replace the federal financing on its own, but that seems unlikely even in a year of budget surpluses—let alone a year in which New York faces a $6.1 billion gap.[17] According to Urban Institute reports,[18] New York would need to backfill $10–$13 billion in federal funding when other lost revenue is factored in besides premium tax credits. Other financial hits would include the loss (or reduction) of federal financial participation for about 40 percent of Essential Plan enrollees and about 1.9 million single adults enrolled in Medicaid; additionally, the ACA's repeal could eliminate support for recipients enrolled through pre-ACA Medicaid waivers in New York and seven other states.

The *Texas* case has taken a lot of twists and turns, and more are certainly in store.[19,20] At the conference scheduled for February 21, 2020, the court could put the case on track for a decision by June 2020, push it back until after the federal elections, or let the matter play out in the lower courts. But for now, a federal judge in Fort Worth, Texas, will decide whether a low-income worker in Queens will retain $20 per month Essential Plan coverage, whether employees at a big firm in Manhattan will continue to enjoy free preventive care for their children, or whether a middle-income family in Buffalo with their own business will pay $1,000 a month or $1,400 a month for coverage through the NY State of Health marketplace.[21]

After a decade of court challenges, destabilizing regulations from the Trump administration, and repeal-and-replace attempts in Congress, New York knows the routine for these bouts of ACA uncertainty: wring all the good out of the ACA that you can, talk long and loud of its benefits, defend it in court, and hold accountable those who would undermine it.

Acknowledgments

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