

## ***Texas v United States***

### **Background on the Lawsuit and the Trump Administration's Position**

Twenty Republican state attorneys general, **including West Virginia Attorney General Patrick Morrisey**, [filed](#) a lawsuit in February 2018 asking the court to declare the ACA's individual mandate unconstitutional and, with it, to strike down significant parts or the entire law. The crux of the Republican states' argument is that the Supreme Court's 2012 decision in *National Federation of Independent Business v. Sebelius* that upheld the ACA's coverage requirement under Congress's taxing power is not controlling because the 2017 tax law zeroed out that tax penalty. Without the tax penalty in place, they claim, the requirement to have coverage is unconstitutional, making the rest of the ACA also unlawful.

From the start, the Trump Administration has taken the unprecedented stance of refusing to defend federal law, a move that seems to have led three senior career attorneys to withdraw from the case and one to [resign](#). But the government's specific position on the case has changed. At the start, in June 2018, the Department of Justice (DOJ) largely agreed with the plaintiff's reasoning. But instead of asking the court to strike down the entire law, it asked it to strike down two critical consumer protections that it said were inextricably linked to the mandate: the provision that bars insurers from denying coverage to people with pre-existing conditions (guaranteed issue) and the prohibition on charging higher premiums to people because of their health status (community rating) instead of defending the law.

Then in March 2019, DOJ filed a [two-sentence](#) letter (and later a [brief](#)) indicating it agreed with the District Court's decision to invalidate the *entire* ACA. While DOJ attorneys suggested at oral argument that the *Fifth Circuit* might not have jurisdiction to immediately strike down the entire ACA nationwide (floating the idea that it should strike down parts or all of the law in only the plaintiff states), DOJ [remains committed](#) to the position that the entire ACA is unconstitutional.

A group of Democratic attorneys general led by California have [intervened](#) to defend the law.

### **What Did the Most Recent Court Ruling on Texas v United States Do?**

On December 18, 2019, the United States Fifth Circuit Court of Appeals issued a [ruling](#) in *Texas v United States* striking down only the individual mandate provision of the Affordable Care Act (ACA). The Court ruled that the individual mandate to buy health insurance cannot stand without the penalty attached to it. Congress repealed the penalty in 2017. The Court did not strike down the rest of the Affordable Care Act.

However, the Court did remand the case to the lower court to decide if parts or the entire ACA could continue without the individual mandate provision (that is, to determine if the provision was intended by Congress to be "severable" from the rest of the ACA). In fact, Congress has already made their intent clear by voting to eliminate the individual mandate penalty and leaving the rest of the ACA in place.

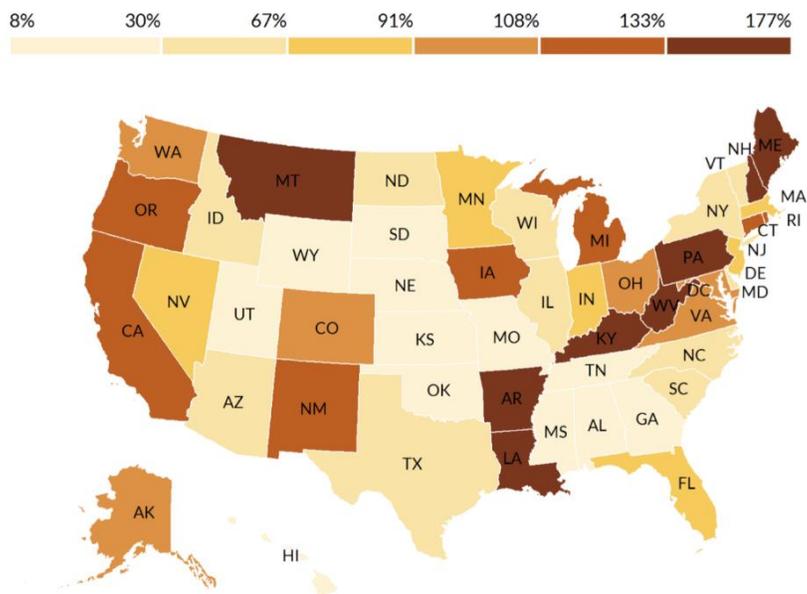
With this decision to remand the case back to the lower court, the case may not go forward to the U.S. Supreme Court in 2020 and before the election in November. Thus, the ultimate fate of the Affordable Care Act may be decided at the ballot boxes. However, On January 3, 2020, [21 Democratic state attorneys general and governors](#) and the [U.S. House of Representatives](#) formally asked the Supreme Court to expedite the case's schedule with the goal of having the case heard in 2020 and a decision issued before the end of this year's term.

On January 6, 2020, the Supreme Court [directed](#) the plaintiffs and the Trump administration to respond to the request for expedited consideration made by the Democratic state officials and the U.S. House of Representatives. The response is due to the Court by close of business on January 10.

### **What Would Happen If Texas or Trump Administration Positions Prevail?**

The Urban Institute [estimates](#) that the number of uninsured people would increase by 20 million people, or 65 percent, if the ACA were struck down. Such a decision would not only end the ACA's major coverage provisions, such as Medicaid expansion, premium tax credits, the health insurance marketplaces, and protections for people with pre-existing conditions, but also insurance rules like the ban on annual and lifetime limits, allowing children to stay on their parents' insurance until age 26, and limits on out-of-pocket costs, as well as unrelated health system improvements enacted in the ACA, like closing the Medicare prescription drug donut hole and various provisions strengthening Medicaid.

**Percent Increase in the Uninsured under Full ACA Repeal by State, Nonelderly Population, 2019**



URBAN INSTITUTE

Source: Urban Institute Health Insurance Policy Simulation Model.

Note: ACA = Affordable Care Act.

The result would be nearly as devastating if the courts were to strike down parts of the ACA. For example, allowing insurers to again use pre-existing condition exclusions or deny coverage or charge higher premiums based on preexisting conditions would put coverage at risk for [133 million](#) people who could be charged more, denied coverage for certain diagnoses, or blocked from individual market coverage altogether because they have certain health conditions. Eliminating these provisions could also allow insurers to charge higher premiums to women, older people, and people in certain occupations, allow pre-existing conditions exclusions to return

for people with [employer coverage](#), and make the premium tax credits [nearly impossible](#) to administer, raising questions about whether or how they would continue.

### **What Would be the Impact on West Virginia if the ACA is Repealed?**

It is hard to describe the full scope of the negative impact on West Virginia if the ACA is repealed. There is no question that it will throw our national and state health care systems into chaos. At the big picture level, the uninsured rate in West Virginia would rise to 18 percent, with [162 thousand](#) West Virginians uninsured. The resulting increase in uncompensated care will likely close the doors of some of our West Virginia rural hospitals and providers. In fact, West Virginia is one of the states with the most to lose if the ACA is repealed.

***Can West Virginia ameliorate the harm of a repeal of the ACA? The answer is no. The cost would be prohibitive to our state and West Virginia's jurisdiction would not allow it to enact all the laws necessary to replicate ACA consumer protections.***

***First***, the ACA provides both significant premium subsidies to people below 400 percent of the Federal Poverty Level to help them purchase quality insurance coverage on the ACA state Marketplaces.

The subsidies (advanceable and refundable premium tax credits) are available to individuals who make \$49,960 or less a year in 2020 (for a family of four the income cap for premium financial assistance is \$103,000 a year. The average monthly ACA premium subsidy for West Virginians is \$765 per person. More than 17,500 West Virginians receive a subsidy. The estimated annual premium tax credits received by West Virginia ACA Marketplace enrollees is [almost \\$162 million dollars](#). ***The state would need to replace these \$162 million federal dollars in the first year and with the inflation of health care costs, this amount would climb each subsequent year.***

***Second***, the ACA provides extensive consumer protections for all people with pre-existing conditions.

West Virginia has the highest percentage of people under age 65 with a pre-existing condition with [37 percent of the state population](#) at risk of insurance company discrimination. The ACA already provides three levels of consumer protections for people with pre-existing conditions:

1. **Guaranteed Issue:** The ACA requires insurance companies to offer a policy to an applicant without regard to health status and no one can be denied a policy because of a pre-existing condition ("guaranteed issue").
2. **No Medical Underwriting:** The ACA requires insurance companies to sell a policy without raising the premiums because of a person's health status or pre-existing condition.
3. **No Exclusion Riders:** The ACA requires insurers to sell a policy to a person with a pre-existing condition without any special limits on the benefits covered by the policy (these limits are called exclusion riders).

Republican proposals in Congress have failed to meet this test and provided only guaranteed issue. Or have promoted high risk pools which have failed in the past to protect consumers with pre-existing conditions from very high premiums and limited their choice of plans.

Guaranteed issue without protections from medical underwriting and exclusion riders leaves West Virginians with pre-existing conditions the "right" to buy an insurance policy at exorbitantly high premiums and no

coverage for the care that they need. It leaves West Virginians with pre-existing conditions stuck with an expensive swiss cheese insurance plan that leaves them paying premiums for the privilege of being uninsured.

Further, there are legal limits on West Virginia's ability to reinstate ACA protections. Only the federal government is generally allowed to regulate the health insurance offered by self-insured large employers. Most people receive their health insurance through these employers. Thus, ***state law will provide an incomplete substitute for the ACA for West Virginians with pre-existing conditions.***

***Third***, the ACA's prohibitions on discrimination against people with pre-existing conditions would likely be meaningless without other consumer protections such as the ACA's essential health benefit requirements and other standards for what plans must cover. If the ACA were stuck down, and even if insurers were prohibited from varying premiums based on health status, insurers could start a race to the bottom in benefits as plans compete to attract healthy enrollees who do not need comprehensive benefits. This would lead to a state insurance market [without offers of comprehensive coverage](#) that West Virginians in less-than perfect health problems need. ***Benefits to cover mental health and substance use disorder treatment would be the first to go – a hard blow to West Virginia's battle against opioid and other addiction.***

***Fourth***, ACA repeal could also wipe out the Affordable Care Act's Medicaid Expansion which provides affordable, quality health insurance to more than 150,000 adult West Virginians every year. The federal government covers 90 percent of the cost of the health care provided to these West Virginians – more than [\\$900 million](#) in federal fiscal year 2018. ***West Virginia would be forced to pay this \$900 million from the state budget*** or the vast majority of the current West Virginia population covered by the Medicaid Expansion would become uninsured and would have to try to rely on local providers to provide "free" care.

***Fifth***, the repeal of the ACA would also eliminate HealthCare.gov; end important [Medicare](#) and [Medicaid](#) improvements; and create [uncertainty and disruption](#) in both programs by suddenly changing the rules for Medicaid eligibility determinations and Medicare provider reimbursements. West Virginia can do very little about these effects.

***For West Virginia, a full repeal of the ACA would mean a huge loss of both federal Medicaid dollars as well as premium subsidies – more than a billion federal dollars per year. The negative impact on health care access for our families, for the financial health of our rural health providers and hospitals, and the state's overall economy would be devastating to West Virginia.***

It is ironic that now Attorney General Morrisey believes that he can use state legislation to ameliorate the harm to West Virginians that could be caused by his own lawsuit. Trying to repair the potential damage of his own lawsuit to our West Virginia families and health care system with state legislation and dollars is perhaps commendable but clearly impossible. Attorney General Morrisey has put the lives of hundreds of thousands of West Virginians, and hundreds of millions of dollars of federal money that pays for health care for our families, on the line with his lawsuit.

#### **Liberal and Libertarian Legal Experts Alike Call the Case "Absurd" and "Ludicrous"**

Litigation outcomes are unpredictable, and two judges on the Fifth Circuit panel, appointed by Presidents Donald Trump and George W. Bush, appeared sympathetic to the plaintiff states' and the Administration's arguments. But legal experts – including [experts opposed](#) to the ACA and who supported other legal challenges to the law – almost uniformly agree that the arguments in this case are "absurd" or "ludicrous." Two Republican

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state attorneys general (from Montana and Ohio) submitted an [amicus brief](#) arguing that the mandate is severable from the rest of the law. Republican Senator Lamar Alexander [described](#) the Administration’s position as “as far-fetched as any I’ve ever heard.”

While there are various [problems](#) with the plaintiffs’ argument, the central one is that it ignores Congress’s unambiguous decision to zero out the individual mandate while leaving the rest of the ACA intact. Texas and the Trump Administration argue that the individual mandate is so central to the ACA or its pre-existing condition exclusion that, without it, some or all of the law must be struck down. But while the Congress that passed the ACA said the mandate was important for the reformed insurance market to function, the Congress that zeroed out the penalty decided to keep the other provisions in place – and longstanding legal principles say that Congress, not the court, gets to make that decision.

A diverse group of stakeholders and legal experts have weighed in to strongly oppose the plaintiff’s request for an immediate halt to enforcement of the ACA (preliminary injunction) and to pushback on Texas’ substantive claims. Appellate briefs were filed by:

- **Health care providers:** [American Hospital Association and Federation of American Hospitals](#) and [American Medical Association, the American Academy of Family Physicians, the American College of Physicians, and the American Academy of Pediatrics](#), and the [Alliance of Community Health Plans](#).
- **Insurers:** [America’s Health Insurance Plans \(AHIP\)](#).
- **Patient and non-profit groups:** [American Cancer Society, American Diabetes Association, American Lung Association, and the March of Dimes](#); [AARP](#); and [FamiliesUSA, Community Catalyst, the National Health Law Program, the Center on Budget and Policy Priorities, and SEIU](#).

In addition, a group of [legal scholars](#), including some who’ve opposed the ACA in previous challenges, filed a brief arguing that the plaintiff and DOJ misused the severability doctrine – the concept that declaring one provision unlawful voids the entire statute. [Economists](#) explained to the court the economic reverberations that would result if Texas’ argument prevails.

States Suing for an Immediate End to the ACA		States Defending the ACA	
Alabama	Nebraska	<i>Colorado</i>	Minnesota
Arkansas	North Dakota	Connecticut	<i>Nevada</i>
Arizona	South Carolina	District of Columbia	New Jersey
Florida	South Dakota	Delaware	New York
Georgia	Tennessee	Hawaii	North Carolina
Indiana	Texas	Illinois	Oregon
Kansas	Utah	<i>Iowa</i>	Rhode Island
Louisiana	West Virginia	Kentucky	Vermont
<del>Maine</del>	<del>Wisconsin</del>	Massachusetts	Virginia
Mississippi	California	<i>Michigan</i>	Washington
Missouri			

Strikes indicate states that have removed themselves from the suit. Italics indicate newly added states.  
 Republican attorneys general from Montana and Ohio filed an amicus brief that argued that the mandate is unconstitutional but is severable from the rest of the law.