NATIONAL WOMEN'S LAW CENTER

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Supreme Court Vacancy: What's at Stake for Health Care

The Administration is refusing to work on relief for Americans facing hunger, record unemployment, and evictions so that it can push through Judge Barrett's nomination in the middle of an election and a pandemic. The Senate must stop this sham nomination process and focus on the relief and care the country needs.

With the death of Justice Ginsburg, it is not an exaggeration to say that we are at a dangerous precipice. Access to health care for at least 20 million people in this country is in immediate jeopardy. And so much more is on the line for women, particularly women of color. Protections for people with pre-existing conditions, Medicaid expansion, coverage of preventive services, protections against discrimination in health care, and many other important improvements are at stake.

President Trump and his Administration have targeted the Affordable Care Act (ACA) and its protections from day one of his presidency. This includes backing a lawsuit being heard by the Supreme Court in November that seeks to invalidate the law in its entirety.

Who this case comes before will be the deciding factor of whether people are thrown off their health insurance in the middle of a pandemic. Trump's nominee poses a clear and dangerous threat to the Affordable Care Act and to the health and lives of people across the country. But regardless of who he is nominating, there should be no consideration of a nominee now, when an election is underway. Doing so is dangerous to our democracy and the rule of law itself.

The Current Case Before the Supreme Court

The threat to the Affordable Care Act is not hypothetical. One week after the election, the Court will hear oral argument in *California v. Texas*, a lawsuit brought by a group of states opposed to the law, led by Texas.[1] Their goal is to achieve through the courts what Congress refused to do: dismantle the entire ACA.

The case hinges on whether the requirement that individuals obtain health insurance or pay a tax is constitutional. The Supreme Court decided this in 2012 by a 5-4 vote, saying that the individual responsibility provision is a valid exercise of Congress's taxing power,[2] but in 2017, Congress reduced the tax for not having health insurance to zero. Now, the states challenging the law argue that the individual responsibility provision can no longer be considered an exercise of Congress's taxing power and is therefore unconstitutional. The states also argue that the individual responsibility provision was "essential" to the rest of the ACA, and if it is unconstitutional, the entire ACA is invalid. This legal reasoning is flawed but was accepted by two courts.[3]

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After the Trump Administration refused to defend the law, states and Members of Congress stepped in to appeal the erroneous court decisions, and the Supreme Court agreed to hear the case. The Court will be deciding whether the individual responsibility provision is unconstitutional, and if so, whether it invalidates the entire ACA. The Trump Administration weighed in with the Court to argue that the entire ACA should "fall."[4]

This is the third case challenging the ACA before the Supreme Court[5] – Justice Ginsburg was in the majority in each closely-divided case upholding the ACA from legal challenge. A change in composition of the Court with a Trump nominee will almost certainly mean a different outcome this time. If the Supreme Court agrees that ACA should be invalidated its entirety, the results will be devastating, particularly for women.

Trump's Nominee is Likely to Mean the End of the ACA

President Trump promised to only nominate Supreme Court justices who are committed to getting rid of the ACA. His nominee Amy Coney Barrett criticized the Supreme Court's 2012 decision to uphold the ACA – she said Chief Justice Roberts pushed the language of the law "beyond its plausible meaning to save the statute"[6] and signaled support for the dissent's view, which would have invalidated the law. In reference to the 2015 Supreme Court case upholding the law, Barrett said the dissent had "the better of the legal argument."[7] There is every reason to believe – if confirmed – she would vote to strike down the ACA.

What's at Stake

Invalidation of the ACA will have far-reaching consequences, with at least 20 million people immediately losing health care, in addition to critical reforms and protections that have meant the end of discriminatory and harmful insurance industry practices. While so much in the ACA helps women, a few key protections demonstrate how much is at stake for women, especially women of color.

Protections for pre-existing conditions

Between one third and half of all women and girls in the United States have pre-existing conditions for which they could have been denied or excluded coverage, or charged a higher premium, before the ACA.[8] Having had a cesarean delivery, a prior pregnancy, or receiving medical treatment for domestic or sexual violence were among the many "pre-existing conditions" for which insurance companies denied coverage.[9] Because of the ACA, insurance companies are now prohibited from denying coverage to individuals based upon pre-existing conditions, and 68 million women with pre-existing conditions have access to health coverage.[10] Those with pre-existing conditions, including the millions who have tested positive for COVID-19, need the meaningful, legally enforceable protections provided by the ACA.[11] If the ACA is invalidated, insurance companies would be again be able to cherry-pick enrollees by denying coverage outright to those with pre-existing conditions or demanding exorbitantly high premiums. This would be especially harmful to women of color, who have higher rates of pre-existing conditions such as diabetes, asthma, hepatitis B, and HIV/AIDS.[12]

An end to charging women more than men for coverage

The ACA banned the practice of charging women significantly more than men for the same health insurance — a practice known as "gender rating." In 2009, the National Women's Law Center published a nationwide survey of the best-selling plans in state capitals, which found that 95 percent practiced gender rating.[13] In fact, most of those individual plans charged non-smoking women more than men of the same age group who smoked.[14] The practice of gender rating cost women approximately $1 billion a year.[15] The ACA ended gender rating in the individual and small group markets, and ensured that plans can no longer charge women—or their small employer— higher premiums. If the ACA is invalidated, insurance companies could return to employing this discriminatory practice.

Making sure plans cover women's needs

Pre-ACA, health insurance companies not only charged women more for health coverage based on their sex, but the coverage did not meet women's health needs. Most plans in the individual market failed to cover services important to women. For example, pre-ACA in 2008, only 12% of individual market plans included comprehensive maternity coverage.[16] The ACA requires insurance plans to cover a core set of important "essential health benefits," like preventive services, prescription drugs, hospitalizations, and maternity and newborn care. The essential health benefits provision helps ensure that women can actually find and afford health coverage that meets their needs. Without it, women would be forced to pay out of pocket for care, which would mean more women would avoid needed care due to cost. This would particularly impact women of color who were more likely than men and white women to avoid care because of cost.[17]

No-cost coverage of women's preventive services, including birth control

Before the ACA, out-of-pocket costs kept people from accessing the preventive care they needed. With respect to birth control, these costs led people to use birth control incorrectly or forego it altogether. The ACA included a provision requiring all plans to cover a set of evidence-based women's preventive services without out-of-pocket costs, including breast and cervical cancer screenings; comprehensive breastfeeding support services; and the full range of FDA-approved methods of contraception for women and related education and counseling.[18] Thanks to the ACA, last year 61.4 million women had this coverage,[19] ensuring access to critical preventive care. Without insurance coverage, cost can easily become an insurmountably barrier to access to preventive care,[20] especially contraception. Unsurprisingly, lower costs have corresponded with an increase in contraceptive use, and studies confirm that cost is a major determinant of whether people obtain contraceptive care.[21] If the ACA is invalidated, individuals will face financial, logistical, and administrative barriers to accessing the preventive care they need, including contraception. This would be particularly harmful for those already facing health disparities due to systemic barriers, such as women of color and women with lower incomes.

Expansion of coverage for lower-income women

Pre-ACA, a population of lower-income women were locked out of private coverage due to cost and did not qualify for Medicaid due to eligibility restrictions. The ACA expanded eligibility to participate in the Medicaid program to anyone meeting the income threshold—including adults without children—and by raising that threshold for single adults.[22] The ACA's expansion of Medicaid brought critical coverage to more women across the country and Medicaid now covers 18% of the nation's women.[23] With expanded Medicaid eligibility, 27 percent of Latinas and 31 percent of Black women ages 15-44 are now enrolled in Medicaid.[24] For lower-income individuals not eligible for Medicaid, subsidies—which covered on average $492 of a $576 monthly premium last year—were provided to offset the cost of insurance premiums in the ACA marketplace.[25] Millions of women covered by Medicaid expansion, or who purchase coverage through the marketplace with the help of federal subsidies, are at imminent risk of losing their health coverage if the ACA is struck down.

Protections against discrimination in health care

Before the ACA, there was no federal law that provided comprehensive protection against sex discrimination in health care or health insurance. Women – particularly black women – paid more for health care and health insurance yet received improper diagnoses and less effective treatments. The ACA sought to address discrimination and disparities in numerous ways, including through the historic provision known as Section 1557. Section 1557 provides robust protections for people who face discrimination in health care because of their race, color, national origin, age, disability, or sex, including gender identity, sex stereotyping, pregnancy, termination of pregnancy, childbirth, or related medical conditions.[26] It is the first-ever federal broad prohibition on sex discrimination in health care and health insurance and provides enforcement mechanisms responsive to individuals facing multiple, intersectional forms of discrimination. If the ACA is invalidated, discrimination would not only persist but increase, seriously harming women and threatening their health. This is particularly true for women of color and others who already suffer from entrenched disparities and intersecting forms of discrimination.

Conclusion

The ACA ended entrenched practices in the health insurance market and health care systems that systematically discriminated against women and left many without access to necessary care and treatment. Women and their families have benefited significantly from these changes. Ultimately, this lawsuit, and the next Supreme Court justice, will determine whether the ACA stands, or whether health care gets taken away from millions during the most devastating pandemic in modern history.

1 *California v. Texas*, No. 19-840, (5th Cir. filed Jan 3, 2020). The case has been consolidated with *Texas v. California*, No. 19-1019, (5th Cir. filed Feb. 14, 2020).

2 *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) (holding that the individual responsibility provision was a constitutional exercise of Congress' power to tax).

3 The Texas trial court agreed with the Plaintiffs' argument and determined that the individual responsibility provision was no longer constitutional because the associated financial penalty did not produce "at least some revenue" for the federal government. The district court further found that the individual responsibility provision was inseverable from the rest of the ACA, and that the entire ACA should be invalidated. On appeal, the 5th Circuit issued a 2:1 decision agreeing with the trial court's finding on the individual responsibility provision, however, it directed the case back to the trial court for a more exacting analysis about whether any ACA provisions could survive without the individual responsibility provision.

4 Brief for the Federal Respondents, *California v. Texas*, No. 19-840, (5th Cir. filed Jan. 3, 2020).

5 *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) (holding that the individual responsibility provision was a constitutional exercise of Congress' power to tax) and *King et al. V. Burwell*, 576 U.S. 988 (2015) (holding that the Internal Revenue Service permissibly created a regulation that extended the tax credits the Affordable Care Act authorized to federal marketplaces as well as those created by the states because federally-created marketplaces are not meaningfully different from those created by states).

6 Amy Coney Barrett, Countering the Majoritarian Difficulty, 32 CONST. COMMENT, 61, 80 (2017), available at https://conservancy.umn.edu/bitstream/handle/11299/183482/4%20- %20Barrett.pdf?sequence=1&isAllowed=y.

7 WBUR, 2015. *SCOTUS Upholds State Health Care Subsidies.* [podcast] On Point, available at https://www.wbur.org/onpoint/2015/06/25/scotus-obamacare-upheld-john-roberts-antonin-scalia (accessed 28 September 2020).

8 CTR. MEDICARE & MEDICAID SERVS., AT RISK: PRE-EXISTING CONDITIONS COULD AFFECT 1 IN 2 AMERICANS https://www.cms.gov/CCIIO/Resources/Forms-Reports-and-Other-Resources/preexisting (last visited Sept. 26, 2020); NAT'L P'SHIP FOR WOMEN & FAMS., *MOVING BACKWARD: EFFORTS TO UNDO PRE-EXISTING CONDITION PROTECTIONS PUT MILLIONS OF WOMEN & GIRLS AT RISK 1* (2018), https://bit.ly/2TZz3l5.

9 Gary Claxton et al., Pre-existing Conditions and Medical Underwriting in the Individual Insurance Market Prior to the ACA 4 KAISER FAMILY FOUNDATION, (2016), https://bit.ly/2EqvFGL; 155 CONG. REC. S10265 (daily ed. Oct. 8, 2009) (Sen. Murray); 155 CONG. REC. S11135 (daily ed. Nov. 5, 2009) (Sen. Bennet); NAT'L WOMEN'S LAW CENTER, NOWHERE TO TURN: HOW THE INDIVIDUAL MARKET FAILS WOMEN 8 (2008), http://goo.gl/QodK0s; see also 155 Cong. Rec. S12462 (daily ed. Dec. 5, 2009) (Sen. Harkin).

10 Jamille Fields Allsbrook & Sarah Coombs, *Moving Backward: Efforts to Strike Down the Affordable Care Act Put Millions of Women and Girls at Risk*, CTR. FOR AMERICAN PROGRESS, (Nov. 4, 2019, 5:00 AM), https://www.americanprogress.org/issues/women/news/2019/11/04/476643/moving-backward-2/.

11 Trump's Executive Order ostensibly addresses pre-existing conditions but amounts to little more than marketing. The Executive Order does not create any right or benefit for those with pre-existing conditions, nor does it provide any substantive protections that are enforceable at law. It is merely a tactic to obscure his work to dismantle the ACA through the courts

12 Heidi Williamson, *ACA Repeal Would Have Disproportionately Harmed Women of Color*, CTR. FOR AMERICAN PROGRESS (Aug. 15, 2017, 9:01 AM), https://www.americanprogress.org/issues/women/news/2017/08/15/437314/aca-repeal-disproportionately-harmed-women-color/.

13 NAT'L WOMEN'S LAW CENTER, STILL NOWHERE TO TURN: INSURANCE COMPANIES TREAT WOMEN LIKE A PRE-EXISTING CONDITION 3 (2009), https://bit.ly/2uclaiX.

14 Id.

15 Danielle Garrett, Turning to Fairness: Insurance Discrimination Against Women Today and The Affordable Care Act 7 (Mar. 2012), NAT'L WOMEN'S LAW CENTER, http://www.nwlc.org/sites/default/files/pdfs/nwlc_2012_turningtofairness_report.pdf.

16 NAT'L WOMEN'S LAW CENTER, supra note 9, at 10

17 H.R. Rep. No. 111-388, at 81 (2009).

18 42 U.S.C. § 300gg-13(a)(4); see also 29 C.F.R. § 2590.715-2713(a)(1)(iv) (2014); see Women's Preventive Services Guidelines, Health Res. and Servs. Admin., (2018), http://goo.gl/MkccR1; see also 155 Cong. Rec. S12274 (daily ed. Dec. 3, 2009) (Sen. Murray).

19 NWLC calculations based on U.S. Census Bureau, 2019 Current Population Survey (CPS), Annual Social and Economic Supplement (ASEC) and Centers for Medicare & Medicaid Services (CMS), 2019 Marketplace Open Enrollment Period (OEP) Public Use Files.

20 KAISER FAMILY FOUNDATION, Women's Coverage, Access, and Affordability: Key Findings from the 2017 Kaiser Women's Health Survey 4 (2018), http://files.kff.org/attachment/Issue-Brief-Womens-Coverage-Access-and-Affordability-Key-Findings-from-the-2017-Kaiser-Womens-Health-Survey.

21 Adam Sonfield, *The Case for Insurance Coverage of Contraceptive Services and Supplies Without Cost-Sharing*, 14 GUTTMACHER POLY REV. 7, 10 (2011).

22 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII).

23 NAT'L WOMEN'S LAW CTR. calculations based on *Current Population Survey, 2018 Annual Social and Economic Supplements, U.S. Census Bureau*, (2018) https://www2.census.gov/programs-surveys/cps/tables/hi/2019/h_02_2018.xls.

24 NAT'L WOMEN'S LAW CTR. calculations based on 2018 American Community Survey (ACS), one-year estimates, using IPUMS.

25 CTR. FOR MEDICARE & MEDICAID SERVS., EARLY 2020 EFFECTUATED ENROLLMENT SNAPSHOT (2020), https://www.cms.gov/CCIIO/Resources/Forms-Reports-and-Other-Resources/Downloads/Early-2020-2019-Effectuated-Enrollment-Report.pdf

26 45 C.F.R. §§ 92.101, 92.4 (2020).