



Weekly Checkup

Another ACA Challenge

CHRISTOPHER HOLT | MARCH 2, 2018

This week saw the emergence of [yet another lawsuit](#) challenging the constitutionality of the Affordable Care Act (ACA). Some twenty states have joined the lawsuit, arguing the recent repeal of the mandate penalty means the mandate can no longer be considered a tax. In *NFIB v Sebelius*, Supreme Court Chief Justice John Roberts indicated that he agreed with four dissenting justices that Congress couldn't mandate the purchase of health insurance but sided with the other four justices in upholding the provision by arguing it was a permissible use of Congress's tax powers. Ergo, those behind the new lawsuit argue that, with the tax portion of the mandate gone, there should be a majority on the Court to strike the mandate.

In and of itself, removing the mandate—which was already ineffective and has now been completely defanged—wouldn't really matter all that much. But the plaintiffs argue that the lack of a severability clause in the statute and the mandate's centrality to the reforms mean that if the mandate is unconstitutional, the entire law must be struck down.

This line of reasoning seems like a stretch. For one thing the argument depends on the idea that Congress believed the mandate was essential to the functioning of the law, yet Congress repealed the mandate penalty just last year while leaving the rest of the law in place. Political realities aside, that seems to undercut the argument that Congress thinks the law depends on the mandate.

Further, in *NFIB* the Court ruled the mandatory nature of the Medicaid expansion to be unconstitutional but left the statute intact (with a small adjustment to the Medicaid provision) even without a severability clause. There is also a question of standing. Without the mandate penalty, it isn't abundantly clear how the mandate is causing harm to the states seeking redress. The harms cited are really the result of other provisions like the insurance market reforms.

I'm not a lawyer, so I'll leave it to others to dissect the legal challenge. But I do have one thought. We're fast approaching the 8th anniversary of the ACA's enactment, and the law is now in its 5th year of full implementation. Back in 2014, the *King v Burwell* case sucked the oxygen out of the health policy debate for months, while conservatives (myself included) crossed their fingers and hoped the Court would wipe away the ACA, letting us start fresh. Last year, Congress expended considerable effort to finally repeal and replace the ACA, but ultimately settled for repeal of the mandate penalty. I applaud and supported that effort. However, at this point the cake may well be baked, and continually swinging for the fences can distract from the important and achievable work of enacting real, market-based reforms, and genuinely seeking to bend the cost curve.

Chart Review

[Tara O'Neill Hayes](#), Deputy Director of Health Care Policy

The federal government's mandatory spending on the major health care programs (Medicare, Medicaid, ACA subsidies, and Children's Health Insurance Program, Department of Defense, Veterans Administration) will continue indefinitely to consume a growing share of overall federal expenditures. Federal spending for just these mandatory programs is expected to surpass \$2 trillion in just four years, accounting for 31 percent of total

projected federal outlays. For comparison, that would account for half of the federal government's total expenditures and 61 percent of federal revenues in FY2017. And this health care total does not include the tens of billions in other health-related spending: to the National Institutes of Health and Centers for Disease Control and Prevention for health care research and public health initiatives, or to the Food and Drug Administration for ensuring access to safe and effective medicines, etc.