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Hearing on "*Texas v. U.S.*: The Republican Lawsuit and Its Impacts on Americans with Pre-Existing Conditions"

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Chairwoman Eshoo, Ranking Member Burgess, members of the committee, thank you for the opportunity to testify today. I am Christen Linke Young, a Fellow with the USC-Brookings Schaeffer Initiative on Health Policy. My research focuses on private insurance, access to coverage, and the intersection between state and federal policy making. I am honored to have the opportunity to speak with you today about recent developments in health policy and their impact on consumers with pre-existing conditions. My testimony this morning reflects my personal views and should not be attributed to the staff, officers, or trustees of the Brookings Institution.

The Impact of the Affordable Care Act

The Affordable Care Act (ACA) has brought health coverage to millions of Americans. Since the law was passed in 2010, the uninsured rate has been cut nearly in half.[1] The ACA's Health Insurance Marketplaces are serving millions of consumers.[2] Insurance markets are functioning well and are offering people comprehensive insurance with robust consumer protections.[3]

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[1] *See, e.g.,* Kaiser Family Foundation, Key Facts About the Uninsured Population, December 7, 2018, https://www.kff.org/uninsured/fact-sheet/key-facts-about-the-uninsured-population/.

[2] *See, e.g.,* Center for Medicare & Medicaid Services, Final Weekly Enrollment Snapshot for the 2019 Enrollment Period, January 3, 2019, https://www.cms.gov/newsroom/fact-sheets/final-weekly-enrollment-snapshot-2019-enrollment-period; Center for Medicare & Medicaid Services, Effectuated Enrollment for the First Half of 2018, November 28, 2018, https://www.cms.gov/newsroom/fact-sheets/effectuated-enrollment-first-half-2018.

[3] *See* Matthew Fiedler, USC-Brookings Schaeffer Initiative for Health Policy, How Would Individual Market Premiums Change in 2019 in a Stable Policy Environment?, August 2018, https://www.brookings.edu/wp-content/uploads/2018/08/Individual-Market-Premium-Outlook-20191.pdf.

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Thirty-seven states, including DC, have expanded Medicaid,[4] and many of the remaining states are considering expansion proposals.

Beyond its core coverage expansion provisions, the ACA has become interwoven with the American health care system. The law included a variety of new standards for employer-provided health insurance to improve workers' coverage. It enhanced Medicare benefits by closing the prescription drug "donut hole" and expanding coverage of preventive services, and made many changes to reimbursement that are now baked into the way Medicare pays providers and issuers. It created new tools for tackling fraud and abuse in federal health care programs. And to highlight a few of the many additional provisions, the ACA funded a variety of public health and health care workforce programs, reauthorized the Indian Health Service, created a pathway for the approval of biosimilar equivalents for biologic drugs, and required employers to provide space for nursing mothers to express breastmilk.

The ACA and Americans with Pre-Existing Conditions

One of the core goals of the ACA was to provide health care coverage for Americans with pre-existing conditions (many of whom had been denied coverage, charged more, or had their condition excluded from coverage prior to the ACA's passage), and I'd like to begin by discussing how the law achieves that objective. By some estimates, as many as half of non-elderly Americans have a pre-existing health condition,[5] and the protections the law offers to this group cannot be accomplished in a single provision or simple legislative proclamation. Instead, it requires a variety of interlocking and complementary reforms threaded throughout the law.

At the center are three critical protections: consumers have a right to 1) buy and renew a policy regardless of their health care needs; 2) have that policy cover the care they need, including care

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[4] Kaiser Family Foundation, Status of State Action on the Medicaid Expansion Decision, January 23, 2019, https://www.kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act.

[5] Emily Gee, Center for American Progress, Number of Americans with Pre-Existing Conditions by Congressional District, April 5, 2017, https://www.americanprogress.org/issues/healthcare/news/2017/04/05/430059/number-americans-pre-existing-conditions-congressional-district/. *See also* Gary Claxton et al, Kaiser Family Foundation, Pre-existing Conditions and Medical Underwriting in the Individual Insurance Market Prior to the ACA, December 12, 2016, https://www.kff.org/health-reform/issue-brief/pre-existing-conditions-and-medical-underwriting-in-the-individual-insurance-market-prior-to-the-aca (estimating 27 percent of non-elderly Americans have a pre-existing condition).

associated with their pre-existing conditions as well as new conditions; and 3) be charged the same price regardless of health status. These protections work together and are the law's essential starting point, but the law takes necessary additional steps. The ACA also prohibits annual and lifetime limits on the dollar value of care received and requires most insurers to impose a maximum out-of-pocket limit on copays, deductibles, and other cost-sharing. Crucially, the law ensures that insurance for the healthy and insurance for the sick are part of a single risk pool. With these critical consumer protections, robust risk adjustment is essential for enabling insurance markets to pool and share risk. Further, the law provides financial assistance tied to income to help make health insurance more affordable to Americans with pre-existing conditions at all income levels.

Texas v. U.S. and the ACA

However, a recent lawsuit threatens the system of protections put in place under the ACA. In *Texas v. United States*, a group of state attorneys general argue that changes made to the ACA's individual mandate in 2017 legislation render that provision in the law unconstitutional. Therefore, because of the supposed constitutional problem with a single provision, they puzzlingly argue that the entire ACA should be invalidated – stripping away its protections for people with pre-existing conditions and everything else included in the law. The Trump Administration's Department of Justice has agreed with the claim of a constitutional deficiency, and they further agree that central pillars of the pre-existing condition protections – the ability to buy and renew a plan and not be charged more – should be eliminated. But, unlike the state attorneys general, the Department of Justice argues that the weakened remainder of the law should be left to stand.

Other scholars can discuss the weakness of this legal argument; I'd like to discuss its impact on the health care system. The position articulated by the Department of Justice – that the law's core protections for people with pre-existing conditions should be removed – would leave Americans with health needs without a reliable way to access coverage in the individual market. Insurers would be able to deny coverage and charge more based on enrollees' health status. In many ways, the market would look like the pre-ACA individual market. Some components of the ACA would formally remain in place, but it is unclear how that would work in practice. With individuals required to complete medical underwriting screens and prices varying for every consumer, those broader ACA policies – like financial assistance, risk adjustment, and a standardized Marketplace – would struggle.

The position of the state attorneys general would wreak even greater havoc and fully return us to the markets that predated the ACA. In addition to removing central protections for those with pre-existing conditions, the financial assistance for individuals and families purchasing coverage and the ACA's funding for states' Medicaid expansions would also disappear. The Congressional Budget Office has estimated that repeal of the ACA would result in as many as 24 million additional uninsured Americans,[6] and similar results could be expected here.

The impact would also extend far beyond Medicaid and the individual market. The ACA's consumer protections for employer-based coverage, affecting more than 150 million Americans,[7] would be eliminated. The ACA's changes to Medicare would be undone, reinstating copays on preventive services and re-opening the prescription drug "donut hole." It would also create major confusion in Medicare payment, as the ACA policies that are today fully integrated into the Medicare payment rules would suddenly lack a legislative basis. The reauthorization of the Indian Health Service would no longer be in force. The FDA would not be authorized to approve the sale of biosimilar versions of biologic drugs, needlessly holding back new drugs that would lower costs. Indeed, these are just some of the many and far-reaching effects of suddenly eliminating a law that is deeply integrated into the health care system nearly nine years after its passage.

Other Concerns for Americans with Pre-Existing Conditions

Before I close, I would like to briefly note that *Texas v. United States* is not the only recent development that threatens protections for Americans with pre-existing conditions. Recent policy actions by the federal Department of Health and Human Services also attempt to change the law in ways that would undermine the ACA's protections.

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[6] Congressional Budget Office, Budgetary and Economic Effects of Repealing the Affordable Care Act, June 19, 2015 https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/50252-effectsofacarepeal.pdf. *See also* Congressional Budget Office, Federal Subsidies for Health Insurance Coverage for People Under Age 65: Tables From CBO's March 2016 Baseline, March 2016, https://www.cbo.gov/sites/default/files/recurringdata/51298-2016-03-healthinsurance.pdf.

[7] *See, e.g.*, Kaiser Family Foundation, Health Insurance Coverage of the Total Population, 2017, https://www.kff.org/other/state-indicator/total-population/.

As just a few examples: Guidance addressing State Innovation Waivers under Section 1332 of the ACA purports to let states weaken the ACA's protections. It attempts to permit states to provide less comprehensive coverage that would not meet the needs of those with pre-existing conditions, and to reduce the number of state residents with high quality coverage. Nationwide, efforts to promote short-term health coverage and Association Health Plans seek to fragment the risk pool so that healthy people have options that are not available to the sick, thus raising the cost of coverage for the sick. Additionally, new waivers in the Medicaid program allow states to place administrative burdens in front of those trying to access care, which can pose distinct barriers for those with disabilities or significant health needs.

Conclusion

To summarize, the Affordable Care Act has resulted in significant coverage gains and meaningful protections for people with pre-existing conditions. *Texas v. United States* threatens those protections and could take us back to the pre-ACA individual market – a time when a person's health status was a barrier to coverage and care. The lawsuit would also damage the broader health care policy environment, and this litigation coincides with other attempts to undermine the ACA's protections for people with pre-existing conditions.