



FREE MINDS AND FREE MARKETS

Trump Teases Further on Executive Order on Pre-Existing Conditions: It's a "Double Safety Net" and a "Second Platform."

Josh Blackman

August 11th, 2020

On Monday, President Trump held a press conference. At 31:30, a reporter asked him about his planned executive order on pre-existing conditions. Why was it necessary, the reporter asked, given the fact that the ACA already requires insurers to cover people with pre-existing conditions. Trump's response is barely coherent. He states, over and over again, that the individual mandate was "terminated." It wasn't. The penalty was reduced to \$0. But at 33:05, President Trump finally meanders to his answer.

I'll transcribe it here, as best as I can:

And pre-existing conditions, Republicans are 100% there. And I'll be issuing at some point in the not-too-distant future a very strong statement on that, probably in the form of an executive order.

At that point, the reporter asked again why he needed an executive order if the ACA already includes that requirement. Trump responds:

Just a **double-safety net**, and just to let people know that the Republicans are totally strongly in favor of pre-existing condition, taking care of people with pre-existing conditions. It's a signal to people, it's a **second platform**. We have pre-existing conditions will be taken care of 100% by Republicans and the Republican party. I think it's a very—I actually think it's a very important statement.

The media continues to completely miss what is going on here. (Just like they completely botched the President's four executive actions—the New York Times is still saying they might be "unconstitutional.")

What is going on here? I blogged about the plan over the weekend. I'll repeat my take here.

Ilya Shapiro and I filed the Cato Institute's amicus brief in *California v. Texas*. We proposed that the Trump administration could require, by executive action, insurers on the ACA exchange to comply with guaranteed issue and community rating. But why would such an executive action be needed if the ACA is in place? Well, the ACA is currently being challenged. And perhaps one factor that could aid the Court's deliberations would be an assurance that people with pre-existing protections could still obtain coverage on the exchanges, even if *guaranteed issue* and *community rating* (GICR) were found to be inseverable.

Here is an excerpt from our brief. Note the last emphasized sentence in Footnote 12.

The analysis for individual market, on-exchange policies is different. Hurley and Nantz are not eligible for subsidies. Declarations, *supra*. But they could still purchase an unsubsidized plan on the exchanges. Halting GICR with respect to policies sold *on* the exchanges would be an unnecessarily overbroad remedy. So long as the plaintiffs can purchase off-market non-compliant plans, or none at all, their injuries will be remedied. Plaintiffs cannot demand a greater remedy to alter *all* policies offered on government exchanges. Moreover, people who seek to buy a government-sponsored product on a government exchange cannot complain about cumbersome regulations. [FN 12] Courts need go no further than issue a declaration with respect to individual market, off-exchange policies. "[T]he judicial power is, fundamentally, the power to render judgments in individual cases." *Murphy*, 138 S. Ct. at 1485 (Thomas, J., concurring). No more, and no less. Hurley and Nantz, meanwhile, and all those who object to being forced to purchase unwanted policies, will have other options.

[FN12]: This narrow remedy would address concerns raised by the Federal Respondents about creating a "potentially unstable insurance market." See Brief for the Federal Respondents at 44–45. **The executive branch could also require insurance providers on the exchanges to comply with the ACA's GICR provisions, regardless of the outcome of this litigation.**

Trump described this executive order as providing a "double safety net" and a "second platform." These words, through the filter of Trump, sound very close to what Cato proposed. Even if the Supreme Court declares the ACA's GICR mandate unconstitutional, insurers on the ACA exchanges would still be required to comply with the executive order's GICR mandate. That is the "double safety net." And the "second platform" would be an exchange where people could buy policies that comply with GICR.

I wouldn't be surprised if Acting SG Wall refers to this executive action as a "safety net." This model is designed to put the Justices at ease.

We'll see if I'm right.

Josh Blackman is a constitutional law professor at the South Texas College of Law Houston, an adjunct scholar at the Cato Institute, and the President of the Harlan Institute. Follow him @JoshMBlackman.