

# The New York Times

## Absurd, Shocking, Embarrassingly Bad

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Health insurance for millions of Americans is once again at risk, thanks to President Trump and a small number of Republican-appointed judges.

Trump is supporting the latest and strangest legal challenge to the Affordable Care Act, and some federal judges have indicated that they may rule in favor of the challenge. A Republican-appointed trial court judge ruled in favor of overturning the law last December, and a three-judge appeals panel — with two conservatives on it — is now hearing the case.

Yet even some conservative legal experts who supported past efforts to throw out the law think this challenge is outrageous. Jonathan Adler of Case Western University has called the current case “just absurd,” as well as “unmoored” and “shocking.” Ted Frank, a lawyer at the Competitive Enterprise Institute, called the trial judge’s decision “embarrassingly bad.” Ilya Somin of George Mason University has signed a brief opposing the lawsuit.

And conservative writers including Philip Klein of the Washington Examiner and the Cato Institute’s Michael Cannon have criticized the lawsuit. The headline on Klein’s piece is: “I hate Obamacare, but Texas judge’s decision on its unconstitutionality is an assault on the rule of law.”

How has this case managed to go so far? Jonathan Cohn of HuffPost has written a helpful summary.

The brief version is: The Supreme Court ruled in 2012 that the health law was legal even though it overreached in requiring people to buy health insurance, because that requirement — known as the mandate — wasn’t really a requirement. People could choose not to have insurance and instead pay a fee, which meant that the mandate was more akin to a tax on the uninsured. Congress clearly has the right to impose taxes.

Trump’s tax law, passed in 2017, reduced this fee on the uninsured to zero. In the current lawsuit, the plaintiffs have taken advantage of this change to argue that the mandate is now back to being a mandate rather than a tax — even if it’s an irrelevant mandate, because ignoring it brings no penalty. As Cohn wrote, “It doesn’t take a fancypants law degree to see that the new scheme is, if anything, less intrusive than the old one — a point that the attorneys for California and the U.S. House [who were arguing against the Trump administration] made several times.”

**And yet ...**

What happens next is unclear. The two Republican appointees on the appeals court, which is based in New Orleans, seemed sympathetic to the lawsuit during arguments on Tuesday. But perhaps they will nonetheless rule against the challenge.

Or perhaps the New Orleans court will rule against the law and the Supreme Court will again reaffirm its constitutionality, overruling the appeals court.

In the worst-case scenario, the appeals court and the Supreme Court would both use a dubious technicality to take health insurance away from an estimated 20 million people.

Whatever happens, it's clear that the Trump administration and some supposedly conservative judges are doing exactly what they so often accuse liberal judges of doing: Pretending that they are legislators. Trump wasn't able to repeal Obamacare in Congress, so he is now hoping that the courts will do it for him.

“If the suit is successful ... it will create an acute problem for a lot of people. Insurers will again be able to discriminate against people with chronic conditions. Many states' budgets will be thrown into turmoil as Washington stops covering most of the tab for the expansion of Medicaid coverage to households just above the poverty line. People who get their insurance through Obamacare's exchanges will stop receiving the tax credits that make it affordable,” Ramesh Ponnuru, the conservative writer, explains in Bloomberg Opinion.

He adds: “The best political outcome for Republicans is probably for the lawsuit to fail, at which point they can complain about the judges who had just delivered them from a nightmare.”

My colleague Paul Krugman writes: “Right-wing partisanship has already corrupted much of the judiciary. At this point it's clear that there are many judges who will rule in favor of whatever the G.O.P. wants, no matter how weak the legal arguments.” If you want more on those legal arguments, check out an Op-Ed from December, by Adler, the Case Western professor, and Abbe Gluck, of Yale Law School.