



## Nobody's got time to wait for 'something terrific'

Brian Chiglinsky

July 11, 2019

It was a little more than a year before he'd lose Virginia and win the presidency that Donald Trump promised a crowd at Richmond International Raceway, "We're going to repeal Obamacare, and replace it with something that's going to be terrific."

Today, nearly four years later, there is no replacement in sight. On Tuesday, his administration argued for a federal court to eliminate the entire Affordable Care Act, and early indications are that two of the three federal judges on the case were sympathetic.

The ACA wasn't a perfect health reform plan, but it was a perfect bill for two reasons. First, it actually passed. And second, once it was fully implemented, millions more people had health coverage. Today, there's no plan sitting in Congress that could do the same. If we learned anything from the four different health care plans Republicans in Congress failed to pass in 2017, it's that there is no replacement on deck.

The administration is gunning hard for repeal through the courts anyway, and the stakes are so shockingly high that they'll give you a kind of vertigo. If the Trump administration has its way and the ACA is struck down, more than 20 million Americans would lose their health insurance. Millions of seniors on Medicare would immediately be forced to pay more for their prescriptions. Kids who decided to join their parents' health insurance before they turn 26 would be in limbo. And insurance companies could immediately go back to denying health coverage to people because of preexisting conditions.

If the Trump lawsuit succeeds, right here in Virginia, more than 640,000 Virginians would lose their health insurance. That includes the hundreds of thousands of Virginians who have finally gotten health coverage through Medicaid over the past year.

The resulting collapse of the nation's health insurance markets would also drag Virginia's economy down. Analysts at the Economic Policy Institute estimate that 10,000 Virginians would lose their jobs in the first two years after the court's decision, and the state would lose more than \$1.6 billion in federal health care dollars. If you think rural hospitals are struggling today, just wait until scores of their patients are suddenly unemployed and uninsured, and federal funding evaporates.

This court case isn't getting as much media attention as the attempts at repeal in 2017, but its fallout would be far worse. So why aren't we seeing the wall-to-wall coverage we saw in 2017?

Part of it is the argument's absurdity. The Republican attorneys general and the DOJ are basically arguing that Congress intended the individual mandate to be an essential part of the ACA. Now that Congress has zeroed out the mandate through President Trump's tax bill, the whole ACA should go as well because the mandate can't be split from the rest of the law. The central flaw in all of this, of course, is that it was Congress who chose to split them in the first place.

University of Michigan law professor Nicholas Bagley tweeted that this argument is "insanity in print." Ohio's Republican Attorney General wrote a brief in support of the ACA's consumer protections. Even the Cato Institute's Michael Cannon, who led a number of high profile challenges to the ACA, has said that he's "seething" over how political the arguments have been in this case.

But reasonableness has never been a guarantee in our federal court system. In 2010, I worked at the U.S. Department of Health and Human Services as we closely tracked a case weaving its way through the courts, centered on whether the individual mandate was constitutional.

Back then, the argument before the courts also sounded absurd. Of course the federal government can regulate interstate commerce, we thought. Health care makes up a sixth of the economy. It's a major piece of interstate commerce.

The experts mostly agreed. Shortly after the ACA passed in 2010, Supreme Court scholar and former clerk Orin Kerr predicted a "9-0 (or possibly 8-1) vote to uphold the individual mandate."

As late as November 2011, political scientists Michael Bailey and Forrest Maltzman predicted a vote of "6-3 or 7-2 to uphold the law" including two of my favorite predictions: "Respect for precedent pushes Kennedy to support the law ... Alito probably goes with Roberts [to uphold the ACA]."

This isn't to dance on the grave of predictions gone awry. It's to show that all of our predictions could be living on borrowed time, even the experts'.

The final decision in 2012, of course, was a narrow 5-4 vote to uphold the law. While progressive advocates celebrated, four justices, including Kennedy and his noted respect for precedent, had decided that not only was the individual mandate unconstitutional, but that the whole Affordable Care Act should be wiped out. The entire thing. Our only comfort today is the hope that the one conservative justice who voted with the four liberal justices would do so again.

Next year will mark 10 years since the Affordable Care Act was signed into law. Over the course of that decade, American politics and the American judicial system have been locked in a constant, pitched battle over its fate. But the American health care system and people's lives have grown around it, shaped it, and found ways to make it work, because they can't wait 10 years for our political system to make up its mind.

At some point, the Affordable Care Act or Obamacare or SCOTUSCare is simply American health care. You can either make it better or make it worse. Right now, the Trump Administration seems bound and determined to make it worse for every American, and every Virginian.

Terrific.