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Anti-Obamacare Brief, Explained

By Mario Loyola

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Today was the deadline for filing briefs on most of the key issues in the Obamacare challenge. [As Kevin mentioned earlier](#), on behalf of Texas Public Policy Foundation, I wrote [a brief](#) with Prof. Richard Epstein and the Cato Institute's Ilya Shapiro. We argue that the health-insurance reforms and subsidy provisions of Obamacare are inseparable from the unconstitutional individual mandate and should be struck down along with it.

The main insurance reforms in Obamacare — guarantee issue, age-based premium compression, and a host of other “improvements” — were attempted in a handful of states in the 1990s. The results were [an unmitigated disaster](#); in most cases the individual insurance market collapsed in just a few years, and within ten years most of the states had repealed their ill-conceived “reforms.”

The reason for the disaster was the “adverse-selection death spiral.” Once you require insurance companies to provide insurance to all comers, healthy people start waiting until they're sick to get health insurance. As healthy people leave the risk pool (“adverse selection”), premiums rise to keep up with the rising per-person cost of insuring people; rising premiums in turn drive more healthy people out of the market, and vice versa (the “death spiral”). To prevent this, the states generally allowed insurance companies to exclude preexisting conditions. That helped, but not nearly enough.

Now, if you want to appreciate a little more fully what a disaster Obamacare really is, consider this: Unlike the state reform efforts (with the exception of Massachusetts) Obamacare has an individual mandate, which is meant to prevent the adverse-selection spiral. Congress thought it could run the huge risk of prohibiting exclusions for preexisting conditions. In other words, Obamacare — without the individual mandate — is a more complete recipe for disaster than any of the state-based insurance reforms.

Its main “reforms” depend vitally on an unconstitutional insurance mandate. If the mandate disappears, but the rest of the law is sustained, healthy Americans above 400 percent of the federal poverty level (\$43,561 income for a single individual) will be driven off health insurance altogether, and will wait until they're sick to sign up. Insurance premiums will rise dramatically, and for those making between \$15,028 and \$43,561 for an individual the cost of federal subsidies will skyrocket. In short, without the mandate Obamacare will result in some combination of (a) devastation for health

insurers and (b) skyrocketing federal deficits.

In our brief, we urge the Court to avoid foisting that disaster on the country and to strike down the individual mandate along with those provisions that are inextricably connected to it — i.e., the main provisions of Obamacare. If the Court agrees, it will eviscerate Obamacare of its most dangerous provisions.

Beyond the great contributions that Prof. Epstein and Cato Institute made to the brief, I'd like to thank my friend Ed Haislmaier of the Heritage Foundation for his selfless patience in guiding us through the myriad of ways in which the main provisions of Obamacare depend upon the unconstitutional individual mandate. All great movements have their unsung heroes, and Heritage has more than its share.

— *Mario Loyola is director of the Center for Tenth Amendment Studies at the Texas Public Policy Foundation.*