

**House Committee on Oversight and Reform**

**Committee Hearing on “The Trump Administration’s Attack on the ACA: Reversal  
in Court Case Threatens Health Care for Millions of Americans”**

**July 10, 2019**

**Written Statement of Abbe R. Gluck, Professor of Law, Yale Law School**

Chairman Cummings, Ranking Member Jordan, members of the Committee:

Good morning and thank you for this invitation. My name is Abbe Gluck. I am a professor of law at Yale Law School, where I serve as the founding faculty director of our health law center, the Solomon Center for Health Law and Policy. I also hold an appointment on the faculty of the Yale School of Medicine, serve as the chair of the Health Care Committee for the Uniform Law Commission and sit on the New York State Taskforce on Life and the Law. My statements today represent only my own views.

My areas of expertise fall squarely within the subject matter of today’s hearing. As a health law expert, I have followed the Affordable Care Act since its enactment. I filed friend of the court briefs in all three of the major ACA cases, including in the Supreme Court in *NFIB v. Sebelius* and *King v. Burwell*, as well as in both of the lower courts in *Texas v. Azar*, the case that is the subject of today’s hearing. I have written more than twenty articles about the ACA and the legal challenges surrounding it, including in the Harvard Law Review’s 2015 Supreme Court issue, the Stanford Law Review, the Yale Law Journal, the New York Times, and the New England Journal of Medicine.

My other area of expertise is the study of Congress, federal courts and statutory interpretation—the specific area of law at issue in this case. I am the coauthor of one of the leading casebooks on legislation and statutory interpretation and have written dozens of articles in the field, likewise appearing in the Yale, Harvard and Stanford law review journals. In 2012, I conducted the most extensive study in history on the congressional lawmaking process and how that process relates to the way courts interpret Congress’s laws. I am the former chair of the Association of American Law Schools Section on Legislation and the Political Process. Through this lens of statutory-law expertise, I have followed the ACA, its legal structure, and the question of severability, which is the central legal doctrine at issue in this case, since the beginning. I appreciate this invitation to appear before you today.

**The Case Has Generated an Unprecedented Consensus Among Legal Experts,  
Including ACA Critics, Opposing the District Court Decision**

The case that is the subject of today’s hearing, *Texas v. Azar*, is unlike any other major case involving the ACA since the statute was enacted. What makes this case critically different from all the other ACA-related litigation is that this is the first major ACA challenge in which there is

a consensus among legal experts—including those who have been the most prominent ACA legal opponents to date—that the legal claims are meritless, that the lower court’s decision is clearly incorrect, and that failing to reverse the decision would undermine core principles of separation of powers and democracy.

That is a truly extraordinary development for a statute whose legal lifecycle has until now produced a series of sharply-disputed legal questions, with divisions often along party lines. This unprecedented legal consensus should give anyone pause about the merits of the lower court’s decision—a ruling that will halt the operation of the entire 2,000-page Affordable Care Act—as well as the Administration’s decision to reverse course and support in full the lower court’s determination.

The stakes cannot be overstated. It has been estimated that 19.9 million Americans would immediately lose their health coverage if the decision is upheld; that approximately 10 million more would lose it in the years that follow<sup>1</sup>—and that tens of millions more would be adversely affected.

Very few people realize how far the ACA now reaches into virtually every aspect of our health care system. We are not just talking about people with preexisting medical conditions, who would indeed lose their health care. And we are not just talking about the 10.3 million people who were able to get and afford their health care through an ACA insurance exchange,<sup>2</sup> or the approximately 17 million people who have accessed health care through the ACA’s Medicaid expansion.<sup>3</sup>

This is a law that now affects everyone in this country, young or old, low income or middle class, and the structure of the entire health care system. That includes seniors on Medicare who would lose substantial benefits; anyone who wants insurance coverage for a vaccine, preventative screening, checkups, prescription drugs, maternity care, HIV treatment, substance use disorder—the list goes on. It includes hospitals serving low income populations, community health systems, the Indian health care system, FDA efforts to get generic drugs to market, and much more.

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<sup>1</sup> See Linda J. Blumberg et al., *State-by-State Estimates of the Coverage and Funding Consequences of Full Repeal of the ACA*, URB. INST. (Mar. 2019), [https://www.urban.org/sites/default/files/publication/100000/repeal\\_of\\_the\\_aca\\_by\\_state\\_0.pdf](https://www.urban.org/sites/default/files/publication/100000/repeal_of_the_aca_by_state_0.pdf) (19.9 million in the first year); CONG. BUDGET OFFICE, HOW REPEALING PORTIONS OF THE AFFORDABLE CARE ACT WOULD AFFECT HEALTH INSURANCE COVERAGE AND PREMIUMS (Jan. 2017), <https://www.cbo.gov/sites/default/files/115th-congress-2017-2018/reports/52371-coverageandpremiums.pdf> (32 million more would be uninsured by 2026).

<sup>2</sup> This statistic is current through the first half of 2018. *Potential Impact of Texas v. U.S. Decision on Key Provisions of the Affordable Care Act*, HENRY J. KAISER FAM. FOUND. (Mar. 26, 2019) (citing Center for Medicare and Medicaid Services, *First Half of 2018 Average Effectuated Enrollment Data*, U.S. DEP’T HEALTH & HUM. SERVS. (Sept. 15, 2018), <https://www.cms.gov/sites/drupal/files/2018-11/11-282018%20Effectuated%20Enrollment%20Table.pdf>), <https://www.kff.org/health-reform/fact-sheet/potential-impact-of-texas-v-u-s-decision-on-key-provisions-of-the-affordable-care-act/> [hereinafter *Potential Impact of Texas*].

<sup>3</sup> See *Potential Impact of Texas*, *supra* note 2 (“FFY 2017, there were more than 17 million Medicaid expansion enrollees in the 32 states and DC that had adopted the expansion. Of those enrollees, 12.7 million were newly eligible due to the ACA’s Medicaid expansion.”).

It is absolutely crucial to understand all the areas into which the ACA extends to appreciate the overreach of the *Texas* court's decision, and the destruction that decision will bring. It is also important to note at the outset that it is quite frankly unclear how these ten years of major structural change in the health care system—which includes not only the health insurance reforms, but countless hospital mergers and new payment models—could even be unwound at this point without extraordinary complexity, uncertainty, and economic instability.**Error! Bookmark not defined.**

With the stakes in view, I want to turn to the legal argument. Why is it that the most prominent ACA legal opponents have not taken advantage of this case to get what they have wanted for a decade—the effective repeal of the ACA? What is it about the decision below, and the Administration's decision to support it, that is so troubling to legal experts of all perspectives that it has generated this unprecedented consensus?

My own legal partner in this case, the person with whom I filed my friend of the court brief, is Case Western Law School Professor Jonathan Adler. Professor Adler was the most vocal and influential legal critic of the ACA during the last major Supreme Court showdown, *King v. Burwell*. He and I were on opposite sides of every single issue in that case. But now we are on a brief together that says regardless of whether you think the ACA is good policy, regardless of what you think of the previous Supreme Court ACA decisions, there is no legal basis for the *Texas* challenge and in fact allowing it to go forward is destructive to congressional power and democratic legitimacy.<sup>4</sup>

Our brief is not an outlier.<sup>5</sup> Among several other briefs filed by prominent conservative legal scholars is a brief by former Judge Michael McConnell, Notre Dame Law Professor Samuel Bray and Richmond Law Professor Kevin Walsh;<sup>6</sup> a brief by two Republican state Attorneys General, Timothy Fox of Montana and Dave Yost of Ohio;<sup>7</sup> and a brief filed by former Solicitor General Walter Dellinger with conservative legal scholar Douglas Laycock.<sup>8</sup> Other highly prominent ACA critics of note here include Michael Cannon of the Cato Institute and the Wall

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<sup>4</sup> Brief of Amici Curiae Jonathan H. Adler, Nicholas Bagley, Abbe R. Gluck & Ilya Somin in Support of Intervenors-Defendants-Appellants, California et al., *Texas v. Azar* (5th Cir. 2019) (No. 19-10011).

<sup>5</sup> Jonathan Cohn, *Even Conservatives Want the Courts to Ignore Trump on Obamacare*, HUFFINGTON POST. (Apr. 3, 2019) [https://www.washingtonpost.com/news/powerpost/paloma/the-health-202/2018/06/15/the-health-202-some-of-obamacare-s-loudest-critics-are-now-defending-the-law-incourt/5b22bfee1b326b3967989ad5/?utm\\_term=.5e5a2ea2020d](https://www.huffpost.com/entry/conservatives-obamacare-lawsuit-briefs_n_5ca3de48e4b0ed0d780dfc1f?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuYmluZy5jb20v&guce_referrer_sig=AQAAAIMD42Q1W2B0AljWXzAEeu3Vx4r0J7EPzazm0wr7UK2LiBqqQNB3ZfOuEnYjgPLPO6fcujeoY9EYWk0qZjbgH109jkhRTISYyltI_35YJCsRAPHNJanWPVJ8BxEL4dqjj9JiJBc2GgSBjgHqBVFMDi6-YfM09wHPZnwY_h0P4pN; Paige Winfield Cunningham, <i>Obamacare's Loudest Critics Are Now Defending the Law in Court</i>, WASH. POST (June 15, 2018), <a href=).

<sup>6</sup> Brief of Amici Curiae Samuel L. Bray, Michael W. McConnell & Kevin C. Walsh in Support of Intervenors-Defendants-Appellants, California et al., *Texas v. Azar* (5th Cir. 2019) (No. 19-10011).

<sup>7</sup> Brief of Amici Curiae States of Ohio & Montana in Support of Neither Party, *Texas v. Azar* (5th Cir. 2019) (No. 19-10011).

<sup>8</sup> Brief of Amici Curiae Walter Dellinger & Douglas Laycock in Support of Intervenor-Defendants-Appellants Supporting Remand and Dismissal, *Texas v.* (5th Cir. 2019) (No. 19-10011).

Street Journal editorial page. Both likewise have put their own views of the ACA aside to say the *Texas*'s court's decision violates long-established legal principles.<sup>9</sup>

The reason for this unprecedented legal consensus is that the specific legal principle at issue in the *Texas* case is an uncontroversial, but very important, centuries-old, doctrine that aims to safeguard legislative supremacy—*Congress's* power—and prevent the courts from improperly exercising lawmaking power. It's a much bigger issue than “Obamacare” and that's why it has produced this response.

### **The Severability Doctrine Is Settled Law that Safeguards Separation of Powers and Prevents Courts from Usurping Congress's Lawmaking Power**

This doctrine is called severability, and unlike in the other ACA cases, which did involve contested legal doctrines, such as the range of Congress's Commerce Clause power (which was at issue in *NFIB*), severability is settled law. So too, unlike many other doctrines and approaches in the field of statutory interpretation, severability principles are not divisive or political; the same rules, the same articulated test, is applied by all nine Justices on the Supreme Court and, indeed, to my knowledge, by every federal judge in this country.<sup>10</sup>

Severability doctrine addresses what a court should do if it finds one part of a statute invalid. Should the court strike down the entire statute or should the court just excise the offending provision or a part of the law? For laws like the ACA that are 2,000 pages long and have many different titles and provisions, the stakes of the question immediately become clear.

In the *Texas* case, the way the question comes up is this: As you well know, in the Tax Cuts and Jobs Act of 2017, Congress made *one* change to the ACA: it reduced to zero the penalty for individuals who fail to obtain insurance.<sup>11</sup> After that, Texas, leading a group of states, brought a lawsuit arguing that the provision is now unconstitutional because without a penalty, it cannot be understood as a tax, and the Supreme Court had construed that requirement as a tax in the first major case, *NFIB*, in order to uphold it.

For purposes of my testimony, I am not going to spend time on this point—why an insurance coverage provision with a zero penalty might still be properly understood as a tax and a valid measure under Congress's taxing power—because the crisis we are facing from the case is

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<sup>9</sup> Michael F. Cannon, *Obamacare's Enemy No. 1 Says This Is the Wrong Way to Kill It*, N.Y. POST (Mar. 28, 2019), <https://nypost.com/2019/03/28/obamacares-enemy-no-1-says-this-is-the-wrong-way-to-kill-it>; Editorial, *Texas Obamacare Blunder*, WALL ST. J. (Dec. 16, 2018), <https://www.wsj.com/articles/texas-obamacare-blunder-11544996418>.

<sup>10</sup> See, e.g., *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165 (2014); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). As discussed below, Justice Thomas recently suggested he might be interested in reconsidering severability doctrine at some point in the future but nevertheless acknowledged the doctrine as controlling law in the case before the court. See *infra* note 18. He is the author of the unanimous 2014 opinion in *Arkison*, which relies on settled severability doctrine. Moreover, his concerns about severability involve its invitation to judicial lawmaking and hypothesizing about congressional intent; precisely the issues on which the district court erred in the *Texas* case.

<sup>11</sup> Pub. L. No. 115-97, tit. I, § 11081, 131 Stat. 2054, 2092 (2017).

not about that insurance coverage provision, which is not even being enforced anymore and compels no one.<sup>12</sup> The ACA markets adapted over the years, and Congress realized the penalty—once thought very important to the law’s functioning—was not needed for the ACA to function. Congress was right. The law continues to work.

It is the *next* question that’s important. Assume the court decides that the coverage provision with zero penalty is not a tax and that the provision is therefore invalid. Then what happens? Does the court excise only the insurance coverage provision from the books and leave the rest of the ACA standing, or does the court end the operation of the entire 2,000-page ACA—halting new Medicare benefits and Medicaid expansion, ending coverage for essential services, ending the Indian health care program reauthorization, ending insurance subsidies, and so on—just because that one provision is invalid?

Severability doctrine is how courts answer questions like this without crossing the line into lawmaking themselves. That is why legal scholars of all stripes who care about separation of powers care about this doctrine so much.

The unbroken line of Supreme Court severability precedent for more than a century rests on two foundational principles.<sup>13</sup> First, the presumption is to save, not to destroy. As Chief Justice Roberts recently explained: “when confronting a constitutional flaw in a statute,” courts must “‘try to limit the solution to the problem,’ severing any ‘problematic portions while leaving the remainder intact.’”<sup>14</sup> Or as Justice Kavanaugh put it in an academic article, courts should “sever an offending provision from the statute to the narrowest extent possible unless Congress has indicated otherwise in the text of the statute.”<sup>15</sup>

Second, the touchstone of the severability doctrine is legislative intent. As the Supreme Court has held numerous times, including in the first ACA challenge, and in a recent opinion authored by Justice Alito, “[u]nless it is ‘evident’ that the answer is no, [a court] must leave the rest of the Act intact.”<sup>16</sup> If the intention of Congress is not clear, courts sometimes try to assess that congressional intent by using a proxy—by asking if the remaining parts of the statute are still functional without the offending provision. If so—and, quoting Chief Justice Roberts again, if “nothing in the statute’s text or historical context makes it ‘evident’” that Congress would not have wanted the balance of the statute to remain without the excised provision—then the rest of the statute should stand.”<sup>17</sup>

Even though the legal test is clear—save, don’t destroy, and follow Congress’s intent—applying it can often be difficult because it can sometimes be hard to know what Congress would

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<sup>12</sup> For more on this argument, see Brief of Intervenor the U.S. House of Representatives, at 39, *Texas v. Azar* (5th Cir. 2019) (No. 19-10011).

<sup>13</sup> See *Alaska Airlines*, 480 U.S. at 684 (calling these “well established” propositions).

<sup>14</sup> *Free Enter. Fund*, 561 U.S. at 509 (quoting *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328-29 (2006)).

<sup>15</sup> Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2148 (2016).

<sup>16</sup> *NFIB*, 567 U.S. at 587; see *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1482 (2018) (Alito, J.) (To invalidate additional provisions as inseverable, “it must be ‘evident that [Congress] would not have enacted those provisions which are within its power, independently of [those] which [are] not.’”)

<sup>17</sup> *Free Enter. Fund*, 561 U.S. at 477.

have wanted without the offending provision. Justice Thomas, for instance, applies severability doctrine as settled law, but has recently raised concerns for precisely this reason, saying it requires the courts to “ask[] a counterfactual question” and make “a nebulous inquiry into congressional intent.”<sup>18</sup>

### **Congress’s Intention Here Is Clear from Its Own Legislative Actions in 2017—There Is No Room for the Court to Guess What Congress Wanted or Substitute Its Own Judgment**

Now back to *Texas*. The reason we have such an extraordinary legal consensus that the district court flouted the severability rules in this case is that this is one of the easiest severability cases most legal experts have ever encountered. The courts do not have to—and indeed are absolutely *not permitted to*—guess whether Congress would have wanted the ACA to stand without an enforceable mandate. Why? Because here the relevant statutory elimination was not done by the court but, rather, by the 2017 Congress in the first place. Congress has already answered the question itself.

Congress *itself* eliminated the penalty in question in 2017 and left the rest of the statute standing. Normally that would be “case closed.” Congressional intent is as clear as it could possibly be because it is embodied in the text and substance of the 2017 statutory amendment itself. By leaving the statute intact while eliminating the penalty, Congress made clear its determination that the statute should function without the penalty. For the same reasons, it is just as clear that Congress determined the law could indeed function without an enforceable insurance coverage provision. The Congressional Budget Office and the Joint Committee on Taxation noted before the tax law was passed that the markets would remain stable without it.<sup>19</sup> The 2017 Congress then made the informed judgement that the law could function without it—a judgment that has proved true.

The problem here is that the *Texas* court substituted its own judgment for that of Congress—it decided that the statute couldn’t function without a penalty, notwithstanding the 2017 Congress’s action. For that reason, the decision works a dangerous usurpation of congressional power and violates basic black-letter severability law. That’s why even the most conservative scholars have sided against the Administration in this case and oppose the decision. As the late Justice Scalia opined in another severability opinion: “One determines what Congress would have done by examining what it did.”<sup>20</sup>

Of course we all know that some members of Congress wished to repeal the ACA entirely. But that is not what happened, and that is not what the votes were. After two years of debate about repeal that culminated in the elimination of only the penalty, no court is allowed to act on a hypothesis that some members of Congress dreamed for a different outcome. To implement the preferences of members of Congress who lost the vote would be for the court to accomplish what

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<sup>18</sup> *Murphy*, 138 S. Ct. at 1485-86 (Thomas, J., concurring); *supra* note 10.

<sup>19</sup> CONG. BUDGET OFFICE, REPEALING THE INDIVIDUAL HEALTH INSURANCE MANDATE: AN UPDATED ESTIMATE (Nov. 8, 2017), <https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/53300-individualmandate.pdf>.

<sup>20</sup> *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 560 (2001) (Scalia, J., dissenting).

Congress could not. That is exactly what the *Texas* court did here, and in so doing the *Texas* court violated the constitutional requirements that protect the congressional majority’s vote—the requirements of bicameralism and presentment in Article I, Section 7 of the Constitution.

The amicus brief for the two Republican Attorneys General puts the point clearly: “[S]everability analysis usually entails asking about the hypothetical intent of a hypothetical Congress. Not here. Congress’s 2017 amendment effectively repealed the individual mandate by reducing the penalty for non-compliance to \$0. That effective repeal objectively establishes that the law is capable of functioning without the mandate (it already does), and that Congress would have preferred such a law to no law at all. The mandate is therefore severable, and its unconstitutionality has no bearing on the rest of the Act.”<sup>21</sup>

They continue:

“In cases like this one, where the text of congressionally enacted law objectively proves what Congress ‘wanted,’ the severability analysis should begin and end with the text. . . . Congress would have been crystal clear if it had wanted to do something as extreme as making the entire Act rise or fall with the constitutionality of a completely inoperative provision. Congress does not ‘hide elephants in mouseholes.’”<sup>22</sup>

### **Privileging the Position of the 2010 Congress over the Later, Amending, 2017 Congress Is Unconstitutional**

There is one more critical point that should be of particular interest to members of Congress and another reason the case has produced the strange legal bedfellows that it has. To get at the result it wished to reach, the *Texas* court had to ignore the intent of the 2017 Congress because the 2017 Congress voted to let the rest of the ACA stand even after the penalty was zeroed out. Instead, the court focused almost exclusively on the views of the 2010 Congress, and how the 2010 Congress was understood by the Supreme Court and the Justice Department back in 2012. The 2010 Congress did view an enforceable insurance requirement as a very important part of the law.

But the view of the 2010 Congress is legally irrelevant. Congress is allowed to change its mind and later Congresses are allowed to amend and change statutes passed by earlier Congresses in light of new information, circumstances and political preferences. The legitimacy of Congress’s judgment in 2017—supported by years of experience with the ACA and evidence that markets had adapted and that the penalty was no longer needed—is not undermined just because an earlier Congress might have made a different judgment.

The Supreme Court has explained that “statutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified.”<sup>23</sup>

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<sup>21</sup> Brief of Amici Curiae States of Ohio & Montana in Support of Neither Party, at 2-3, *Texas v. Azar* (5th Cir. 2019) (No. 19-10011).

<sup>22</sup> *Id.* at 10-13 (quoting Justice Scalia’s opinion in *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001)).

<sup>23</sup> *Dorsey v. United States*, 567 U.S. 260, 274 (2012).

Privileging the views of an earlier Congress over the later amending Congress—as the *Texas* court did here and as the Administration now does by supporting that decision—unconstitutionally entrenches the view of the earlier Congress and, just as unconstitutionally, weakens the power of the later Congress.

For the same reasons, it is worth noting, the Administration’s previous litigating position—that the ACA’s insurance reforms were inseverable from the insurance coverage provision but that the rest of the ACA could stand—was also unconstitutionally grounded. That previous litigating position itself relied on the 2012 litigating position of the Department of Justice. Just as the views of the 2010 Congress are irrelevant now that the 2017 Congress has superseded them with enacted law, the views of the 2012 DOJ—which were directed at the ACA as it was enacted in 2010 and so depended on the views of that 2010 Congress—likewise have no legal bearing on a case that turns on an amendment to the law in 2017. What matters is what the 2017 Congress enacted and what it left standing—the entire ACA but for the penalty. Nothing else is legally relevant here.

I wish to quote from the two Republican Attorneys General brief once more. They write: “There is more at stake here than the future of the Affordable Care Act. . . . [T]he real issue in this case is power—and in particular, the limits of judicial power.”<sup>24</sup>

I agree. It’s also about the constitutional authority of each Congress to do its own work and to change what came before. As someone who focuses on Congress in her academic work, preserving that legislative prerogative is something I take very seriously, and I have been pleased to see legal experts on all sides of ACA questions taking that principle seriously here too. The *Texas* court flouted that principle, and with it the rule of law of severability, when it decided—after the 2017 Congress expressly concluded otherwise—that the entire ACA was to be eliminated. The Administration has done the same with its change in position.

### **Countless Aspects of the Health Care System, Well Beyond Pre-Existing Conditions, Are at Stake**

Before I close, I want to touch briefly on the legal and policy consequences of the ruling, because the *Texas* court’s judicial overreach is exacerbated by the enormity of the human and systemic implications. I will focus in particular on the many things that are in the 2,000-page ACA that most people likely do not realize are threatened by this lawsuit. As I stated at the outset, this law now touches virtually every part of our health care system and every kind of person in this country, young, old, rich, poor, employed or not. It has changed the structure and economics of the health care system in ways that may be impossible to undo or bring chaos in the process.

The Committee already knows that the ACA helped lower the number of people without health insurance by an estimated 20 million people from October 2013 to early 2016, a drop of

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<sup>24</sup> Brief of Amici Curiae States of Ohio & Montana in Support of Neither Party, at 21, *Texas v. Azar* (5th Cir. 2019) (No. 19-10011).



approximately 43 percent in the uninsured rate.<sup>25</sup> As I noted, estimates are that approximately 20 million Americans would lose their coverage immediately if the ACA is halted, with some projecting that 10 million more would become uninsured over the next decade.<sup>26</sup> These numbers are due to a lot more than just the ACA's ban on preexisting conditions.<sup>27</sup>

The ACA prevents insurers from charging people based on health risk, or imposing annual or lifetime caps, or imposing charges that exceed an out-of-pocket maximum.<sup>28</sup> It allows young adults to stay on their parents' plans until they are 26.<sup>29</sup> It prevents women from being charged more than men and limits how much more older Americans, those nearing Medicare age, can be charged.<sup>30</sup> It provides subsidies to make insurance affordable—a benefit that expanded coverage dramatically in the middle class.<sup>31</sup> It must be understood that all of those protections would be gone if the *Texas* ruling stands.

Before the ACA, many insurers excluded from plans what most people deem very basic and essential benefits and that many now take for granted. These are services like maternity care, prescription drug coverage, substance-use disorder treatment and mental health services—many plans before the ACA did not cover these. The ACA requires all insurers in the individual and small group markets to cover them.<sup>32</sup> And with the *Texas* ruling, those basic, critical health care services would be no longer have to be covered.

People also likely take for granted the preventative care that insurance now covers. But it is only because of the ACA that, for instance, blood pressure and cholesterol screenings, cancer screenings, and vaccines for both children and adults are covered. As just one example that has

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<sup>25</sup> Declaration of Henry J. Aaron, ¶ 5, *Texas v. Azar*, 340 F. Supp. 3d 579 (N.D. Tex. 2018) (No. 4:18-cv-00167-O) (citing Namrata Uberoi, Kenneth Finegold & Emily Gee, *Health Insurance Coverage and the Affordable Care Act, 2010-2016*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Mar. 3, 2016), **Error! Hyperlink reference not valid.**<https://aspe.hhs.gov/system/files/pdf/187551/ACA2010-2016.pdf>; Executive Office of the President Council of Economic Advisors, *2017 Economic Report of the President*, U.S. GOV'T PUB. OFF., Ch. 4 (2017), [https://obamawhitehouse.archives.gov/sites/default/files/docs/chapter\\_4-reforming\\_health\\_care\\_system\\_2017.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/chapter_4-reforming_health_care_system_2017.pdf)).

<sup>26</sup> The Urban Institute found that repeal of the ACA's Medicaid expansion, federal subsidies to help qualified individuals purchase exchange plans, and the individual and employer mandates (the portions of the ACA that could be repealed through budget reconciliation) would increase the number of uninsured by 29.8 million people, of whom 82 percent would be in working families. Linda J. Blumberg, Matthew Buettgens & John Holahan, *Implications of Partial Repeal of the ACA through Reconciliation*, URB. INST. (Dec. 2016) [https://www.urban.org/sites/default/files/publication/86236/2001013-the-implications-of-partial-repeal-of-the-aca-through-reconciliation\\_1.pdf](https://www.urban.org/sites/default/files/publication/86236/2001013-the-implications-of-partial-repeal-of-the-aca-through-reconciliation_1.pdf). The Congressional Budget Office and Joint Committee on Taxation estimated that repealing the Affordable Care Act without a replacement would result in 32 million people losing coverage by 2026, with 17 million people losing coverage in the first year after repeal. CONG. BUDGET OFFICE, COST ESTIMATE: H.R. 1628 OBAMACARE REPEAL RECONCILIATION ACT OF 2017, at 1 (July 19, 2017) <https://www.cbo.gov/publication/52939>.

<sup>27</sup> 42 U.S.C. §§ 300gg-13 (mandated coverage of preventive services without cost-sharing requirements).

<sup>28</sup> See 42 U.S.C. §§ 300gg-6(b); 42 U.S.C. 300gg-11.

<sup>29</sup> 42 U.S.C. §§ 300gg-14 (required coverage of adult children up to age 26).

<sup>30</sup> 42 U.S.C. § 300gg.

<sup>31</sup> See 26 U.S.C. §§ 36B, 45R (premium tax credits both for individuals and for small groups); *Potential Impact of Texas*, *supra* note 2 (noting 8.9 million people received subsidies and 5.4 million received cost sharing reductions).

<sup>32</sup> 42 U.S.C. §§ 300gg-6(a), 18022(b).

been reported, women were 3.3 times as likely to have had the HPV vaccine after implementation of the ACA.<sup>33</sup>

All of those protections—not to mention the entire Medicaid expansion—would go if the *Texas* decision is affirmed.

Medicare will also see significant cuts. The ACA strengthened Medicare in ways that the public may not realize. The ACA gave Medicare beneficiaries coverage for preventative care without a copay. It also provided a major prescription drug benefit: Before the ACA, there was no drug coverage after the standard benefit; seniors had to pay out of pocket for prescription drugs until catastrophic coverage kicked in at \$4,550 in out-of-pocket spending (2010 values). The ACA closed that so-called coverage “donut hole” and resulted in Medicare beneficiaries saving more than \$26 billion on prescription drugs from 2010 to 2017.<sup>34</sup> All of these benefits will be eliminated if the *Texas* decision stands.<sup>35</sup>

The ACA has changed Medicare in other ways that would be even harder to unwind. For instance, the ACA replaced the payment system for Medicare Advantage plans. Experts have said it is not clear if or how the system could go back.<sup>36</sup>

Hospitals also will suffer extraordinary losses. An American Hospital Association study estimates that hospital income would be reduced by \$165.8 billion from 2018 to 2026 due to the enormous rise in uncompensated care if the ACA is invalidated.<sup>37</sup>

To add just a few more, but by no means all, of the implications, also eliminated would be:

- The Prevention and Public Health Fund, which supports community-based programs that tackle social determinants of health;
- The Community Health Center Fund, which provides about 70 percent of federal grant programs for these clinics that provide care to 24 million patients;
- The reauthorization and reform of the Indian Health Services Act; and
- The ACA’s new pathway for the approval and sale of generic biologic drugs.

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<sup>33</sup> Declaration of Henry J. Aaron, *supra* note 25 **Error! Bookmark not defined.**, ¶ 33 (citing Rosemary Corriero et al., *Human Papillomavirus Vaccination Uptake Before and After the Affordable Care Act: Variation According to Insurance Status, Race, and Education*, 31 J. PEDIATRIC & ADOLESCENT GYNECOLOGY 1, 23-27 (2017)).

<sup>34</sup> *Nearly 12 Million People with Medicare Have Saved over \$26 Billion in Prescription Drug Costs Since 2010*, CTR. FOR MEDICARE AND MEDICAID SERVS. (Jan. 13, 2017), <https://www.cms.gov/newsroom/press-releases/nearly-12-million-people-medicare-have-saved-over-26-billion-prescription-drugs-2010>.

<sup>35</sup> Juliette Cubanski, Tricia Neuman, Gretchen Jacobson & Cristina Boccuti, *What Are the Implications for Repealing the Affordable Care Act for Medicare Spending and Beneficiaries?* HENRY J. KAISER FAM. FOUND. (Dec. 13, 2016), <https://www.kff.org/health-reform/issue-brief/what-are-the-implications-of-repealing-the-affordable-care-act-for-medicare-spending-and-beneficiaries/>.

<sup>36</sup> Cubanski, Neuman, Jacobson, & Boccuti, *supra*.

<sup>37</sup> Dobson DaVanzo & Associates, LLC for the Federation of American Hospitals and the American Hospital Association, *Estimating the Impact of Repealing the Affordable Care Act on Hospitals* (Dec. 6, 2016), [https://www.aha.org/system/files/2018-02/impact-repeal-aca-report\\_0.pdf](https://www.aha.org/system/files/2018-02/impact-repeal-aca-report_0.pdf).

## **The Administration's Own Health Initiatives Would Be Crippled if the *Texas* Decision Is Upheld**

The current Administration, in supporting the *Texas* decision, may not even realize how essential the ACA is to its own health initiatives.

Take, for instance, the Administration's pledge to end the HIV epidemic within 10 years. HIV is a preexisting condition, but a ban on exclusions based on preexisting conditions is only a small piece of what is needed to address the epidemic. Without the ACA's essential health benefits requirement, insurers could offer people with HIV plans that do not cover HIV treatment. Or make those plans prohibitively expensive. The bans on annual and lifetime limits, and limits on out-of-pocket costs are also critical. The Medicaid expansion and federal subsidies ensure that lower-income and middle-income individuals living with HIV can afford coverage. The ACA requires plans to offer free preventive screenings and yearly check-ups which are essential for prevention and early detection.

As another example, the current Administration has stated its commitment to testing new payment models, such as value based payment. But without the ACA, the Center for Medicare and Medicaid Innovation, which is the entity testing those payments, would be gone.<sup>38</sup>

Or consider the ACA's pathways for generic biologics. Outgoing FDA Commissioner Scott Gottlieb noted that repeal of the ACA would undermine the Administration's efforts to make insulin more widely available and affordable.<sup>39</sup>

Finally, the opioid crisis, which is an area that I study extensively.<sup>40</sup> We cannot effectively address this crisis without the ACA's protections. Medicaid is the country's largest payer for addiction treatment.<sup>41</sup> The exchange subsidies are crucial to getting other individuals insured and given access to the services they need. The ACA's required coverage for mental and substance use disorder treatment—a requirement that did not exist before the ACA—is absolutely essential here as well.

### **Conclusion**

It is not every day that one sees those who were formerly vigorous legal adversaries taking a joint position in the precise terrain over which previous battles were fought. The *Texas* court's judicial overreach—its refusal to apply settled severability doctrine, its disregard of clearly expressed congressional intent in the enacted 2017 legislation itself, and its unconstitutional

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<sup>38</sup> Alex M. Azar II, *Remarks on Primary Care and Value-Based Transformation*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Nov. 8, 2018), <https://www.hhs.gov/about/leadership/secretary/speeches/2018-speeches/remarks-on-primary-care-and-value-based-transformation.html>.

<sup>39</sup> Sarah Karlin-Smith & Brianna Ehley, *How Killing Obamacare Could Backfire for Trump*, POLITICO (Apr. 1, 2019, 5:03 AM EDT), <https://www.politico.com/story/2019/04/01/obamacare-trump-hiv-health-agenda-1244370>.

<sup>40</sup> See, e.g., Ayres, Gluck & Stith, *Law and the Opioid Crisis: An Interdisciplinary Examination* 46 J. L. MED. & ETHICS 201 (2018) (volume guest editor).

<sup>41</sup> See, e.g., Kendal Orgera and Jennifer Tolbert, *The Opioid Epidemic and Medicaid's Role in Facilitating Access to Treatment*, HENRY J. KAISER FAM. FOUND. (May 24, 2019), <https://www.kff.org/medicaid/issue-brief/the-opioid-epidemic-and-medicoids-role-in-facilitating-access-to-treatment/>.

privileging of the views of the 2010 Congress over the 2017 Congress—has produced the exception to the rule and generated a legal consensus of opposition. The Administration has exacerbated the dangers of the *Texas* court’s ruling by deciding to support it.

The case is about more than the ACA: It is about separation of powers, the preservation of congressional authority, and the limits of judicial power. It is also about enormous human and systemic consequences—tens of millions of Americans of all classes, demographics and ages, would lose the health care they now take for granted and may not even realize is dangerously at risk.