

# Trump administration supports lawsuit challenging Obamacare's pre-existing conditions protections

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The Trump administration is supporting a lawsuit that challenges parts of the Affordable Care Act (ACA), arguing that federal courts should find the health law's protection for people with pre-existing conditions unconstitutional.

On February 26, 20 Republican state attorneys general filed suit in federal court charging that Congress's changes to the law in last year's tax bill rendered the entire law unconstitutional. In that bill, the tax penalty for people who fail to obtain insurance was repealed, effective in 2019.

Under the "individual mandate" of Obamacare, as the ACA is commonly known, those people without insurance from their employer or a government program were required to obtain health care coverage or pay a tax penalty. The tax bill removed that penalty but did not repeal any of the ACA's other provisions. The effect, however, was to make the ACA's mandate to obtain coverage unenforceable.

A US Supreme Court decision in 2012 found the ACA constitutional. While the high court said that the government does not have the authority to require people to purchase insurance coverage, it said the ACA should be upheld under Congress's constitutional power to levy taxes. The current 20-state lawsuit seeks to turn that argument around, saying that without the tax penalty to enforce the individual mandate, "the Court should hold that the ACA is unlawful and enjoin its operation."

The Trump administration filed a brief in federal district court in Fort Worth, Texas, on June 7 in support of the states' lawsuit. It argued that without the tax to encourage healthy people to buy insurance, the provisions guaranteeing coverage to people with pre-

existing conditions and charging them the same rates as others should be struck down and declared "invalid beginning on January 1, 2019," when the tax penalty is effectively repealed.

The White House did not go as far as the states in arguing that the entire ACA should be struck down. However, the Justice Department's decision to refuse to uphold the constitutionality of a current law—and join in a lawsuit against it—is highly unusual. According to Attorney General Jeff Sessions, this action was taken with the "approval of the President of the United States."

Three career Justice Department attorneys withdrew from the lawsuit brought by the states in opposition to the administration's failure to defend the ACA's provision. One of these attorneys, Joel McElvain, has tendered his resignation from the department.

The case before the federal court turns on the legal concept of "severability": If one provision in a law is invalidated by a court, it must be determined if the rest of it can continue to stand. Texas, a party to the suit, argues that the individual mandate is so pivotal to Obamacare that if it is not upheld, then the rest of the law must be declared unconstitutional.

Senator Lamar Alexander, Republican of Tennessee and chairman of the Senate Health Committee, said Tuesday it was never the intent of Congress to repeal the protections for people with pre-existing conditions when it repealed the mandate penalty late last year. He said that the Trump administration's argument against the ACA in the federal lawsuit is "as far-fetched as any I've ever heard."

Having twice failed to push legislation through Congress to repeal and replace Obamacare, the Trump

administration is working to chip away at the legislation through various means. In addition to the repeal of the individual mandate tax penalty and joining the lawsuit of states seeking to have the protections for people with pre-existing conditions ruled unconstitutional, it is expected soon to issue rules that will expand the market for lower-cost and short-term policies that will not be required to follow the ACA's rules on essential services and maintaining virtually continuous coverage.

If the pre-existing conditions provisions are ruled unconstitutional, private insurers could revert to rejecting people with many conditions—including cancer, heart failure, diabetes, arthritis and many less serious health problems—or charging them much more for coverage.

Although estimates of the numbers of Americans with these conditions vary, the Kaiser Family Foundation estimates that 27 percent of people under age 65 have what could be considered a pre-existing condition. It could also cost women more than men to get coverage for basic health care and maternity care.

The Supreme Court's 5-4 decision in 2012 to uphold the individual mandate and the ACA's constitutionality did not constitute an advance for the health care rights of Americans. The health legislation was crafted under the Obama administration to serve the interests of the private insurers, pharmaceutical firms and giant health care chains. In particular, the individual mandate was designed to funnel billions of dollars from new customers into the coffers of the insurance companies.

America's Health Insurance Plans (AHIP), an industry trade group, criticized the federal government's filing in Dallas. AHIP's concern is not focused on the protection of coverage for people with preexisting conditions. Rather, the group said in a statement, "Removing those provisions will result in renewed uncertainty in the individual market, create a patchwork of requirements in the states, cause rates to go even higher for older Americans and sicker patients, and make it challenging to introduce products and rates for 2019."

Even if the pre-existing conditions provision is not jettisoned, the lack of a tax penalty to enforce it will cause younger, healthier people to take the gamble to remain uninsured, leaving sicker and older policyholders at the mercy of the insurers, who will

respond by raising premiums.

Health insurance companies raised rates this year by double digits and insurers in several states have already requested large rate hikes for 2019. New York insurers are asking for premium hikes of 24 percent, on average, while carriers in Washington state are looking for a 19 percent average rate hike. In Maryland, CareFirst is seeking an average 18.5 percent rate hike for HMO plans and a 91 percent increase for its already more expensive PPO policies.



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