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## Backdoor Repeal: How Health Care Opponents are Rewriting History to Challenge the Affordable Care Act in Court

Joel Dodge

Just days after the November 2020 election, the U.S. Supreme Court will hear the latest lawsuit attempting to strike down the Affordable Care Act (ACA). The case, known as *California v. Texas*, is the third existential threat to the ACA to reach the Supreme Court in the last eight years,<sup>1</sup> and the first since Justices Neil Gorsuch and Brett Kavanaugh were appointed to the Court by President Trump. With the potential for a third Trump Supreme Court appointee to be rammed through the Senate in the days before the 2020 election, the ACA may be in even graver legal jeopardy.

If successful, the lawsuit would be devastating to the twenty million Americans who gained health insurance through the ACA's coverage expansion and the 133 million Americans with preexisting conditions whose coverage is guaranteed under the ACA.<sup>2</sup> The ACA's coverage expansion and its investment in community health centers have only become more vital during the COVID-19 pandemic. Because of COVID-related job losses, over twenty million more people are expected to rely on the ACA's insurance marketplace or Medicaid for health insurance by January 2021.<sup>3</sup> In the meantime, many Americans lack health insurance because President Trump refused to initiate a special enrollment period on the ACA's insurance marketplaces during the coronavirus pandemic.<sup>4</sup>

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<sup>1</sup> See *Nat'l Fed. Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012); *King v. Burwell*, 576 U.S. 988 (2015).

<sup>2</sup> U.S. DEP'T OF HEALTH AND HUMAN SERVS., ASSISTANT SEC'Y FOR PLANNING AND EVALUATION, [HEALTH INSURANCE COVERAGE FOR AMERICANS WITH PRE-EXISTING CONDITIONS: THE IMPACT OF THE AFFORDABLE CARE ACT](#) (Jan. 5, 2017); CTR. ON BUDGET AND POL'Y PRIORITIES, [CHART BOOK: ACCOMPLISHMENTS OF AFFORDABLE CARE ACT](#) (Mar. 19, 2019).

<sup>3</sup> Rachel Garfield et al., *Eligibility for ACA Health Coverage Following Job Loss*, KAISER FAMILY FOUNDATION (May 13, 2020).

<sup>4</sup> Susannah Luthi, *Trump Rejects Obamacare Special Enrollment Period Amid Pandemic*, POLITICO (Mar. 31, 2020).

Yet, the Trump administration and the Republican state attorneys general bringing this lawsuit are seeking to dismantle health care access in court. Their goal, as President Trump has freely admitted, is “to terminate health care under Obamacare.”<sup>5</sup>

The outcome of this case – and the magnitude of potential harm to Americans – hinges on a single question: When Congress passed the 2017 tax reform bill did it intend for the entire ACA to fall when it zeroed out the law’s tax penalty for people without health insurance? Fortunately, the answer to what Congress had in mind for the ACA in 2017 is readily discernible from what Congress actually *did* in 2017. As the parties defending the law and their amici explained to the Supreme Court, a close look back at recent legislative history leaves no room for doubt: Congress opted to eliminate the mandate penalty while retaining the rest of the ACA.<sup>6</sup>

The Trump administration and the Republican attorneys general in the lawsuit have concocted an alternative history divorced from reality. In their view, Congress’s narrow action adjusting the mandate’s tax penalty in 2017 meant that Congress wanted the *entire* ACA eliminated. The Supreme Court ought to see through this calculated revisionist history which cannot hold up against the facts and the law.

## I. Background

When Congress passed the Affordable Care Act in 2010, it adopted a “three-legged stool” approach to expand private health insurance coverage.<sup>7</sup> The three principal legs to health reform were: (1) a ban on insurance companies engaging in coverage and premium discrimination against people with preexisting conditions; (2) financial assistance to help individuals afford private health insurance; and (3) a general requirement that most Americans maintain health insurance coverage or pay a tax penalty (known as the individual mandate).<sup>8</sup>

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<sup>5</sup> Devlin Barrett, *Trump Vows Complete End of Obamacare Law Despite Pandemic*, WASHINGTON POST (May 6, 2020).

<sup>6</sup> See [Opening Brief for Petitioners, California v. Texas](#), No. 19-840 (U.S. filed May 13, 2020); [Opening Brief for the U.S. House of Representatives, California v. Texas](#), No. 19-840 (U.S. filed May 6, 2020); [Brief of Health Care Policy Scholars as Amici Curiae Supporting Petitioners, California v. Texas](#), No. 19-840 (U.S. filed May 13, 2020); [Brief of 47 Members of the United States Senate as Amici Curiae in Support of Petitioners, California v. Texas](#), No. 19-840 (U.S. filed May 13, 2020).

<sup>7</sup> Jonathan Gruber, *Health Care Reform Is a “Three-Legged Stool”*, CENTER FOR AMERICAN PROGRESS (Aug. 5, 2010).

<sup>8</sup> The “individual mandate” was a relatively weak incentive to maintain insurance. It was subject to numerous exemptions for hardship and other life circumstances. And the penalty for lacking insurance was just \$695 or 2.5 percent of household income – an amount that was generally far less than the cost of actually buying insurance. See Joel Dodge, *Can Obamacare Survive Without the Individual Mandate?*, NEW REPUBLIC (Jan. 3, 2018); see also Sarah Kliff, *Republicans Killed the Obamacare Mandate. New Data Shows It Didn’t Really Matter*, N.Y. TIMES (Sept. 21, 2020) (“Many experts now view the individual mandate as a policy that did little to increase health coverage.”).

Health care opponents immediately went to court to weaken all three legs of the law. First, they challenged the individual mandate, arguing that it exceeded Congress's power to regulate commerce under the Commerce Clause.<sup>9</sup> In *NFIB v. Sebelius*, the Supreme Court upheld the mandate in a 5-4 decision, with Chief Justice John Roberts casting the decisive vote to uphold the mandate as a tax.<sup>10</sup>

Less than three years later, litigants singled out an isolated phrase in the text of the ACA to argue that the government could not offer financial assistance to people purchasing insurance in states that declined to create their own healthcare marketplaces. This argument would have devastated the ACA's coverage expansion in thirty-five states, making insurance unsubsidized and unaffordable, and the individual mandate nearly inoperable. Luckily, in *King v. Burwell*, the Supreme Court rejected that interpretation and upheld the ACA by a 6-3 vote with Chief Justice Roberts and Justice Kennedy joining the Court's four liberal justices.<sup>11</sup>

Meanwhile, congressional opponents of the ACA repeatedly tried to repeal the law. As discussed in detail below, these efforts culminated in several close votes in 2017. Congress ultimately succeeded however in removing just one of the ACA's three legs, effectively eliminating the individual mandate by making the tax penalty for going without insurance \$0 as part of the Tax Cuts and Jobs Act ("TCJA"), which was enacted through budget reconciliation.<sup>12</sup>

After the TCJA was signed into law, a group of eighteen Republican state attorneys general (later joined by two individual plaintiffs) brought a federal lawsuit arguing that the rest of the ACA had been rendered unconstitutional by the elimination of the mandate's tax penalty. Their argument had two parts. First, because Chief Justice Roberts upheld the individual mandate as a valid exercise of Congress's taxing power in *NFIB*, the zeroed-out mandate that remained on the books after the TCJA was not a tax and thus was no longer constitutional. Second, if the mandate is now unconstitutional, most of the rest of the ACA must be struck down too.

This second argument relies on a grab bag of legislative history, imputing the intent of the 2010 Congress that created the individual mandate tax penalty to the 2017 Congress that repealed it. In 2010, the 111<sup>th</sup> Congress that enacted the ACA found that the three main insurance market regulations (banning pre-existing conditions, financial assistance to afford health insurance, and the individual mandate) were interlocking and indispensable. The plaintiffs in *California v. Texas* argue that these findings by the 2010 Congress govern the severability inquiry and dictate that

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<sup>9</sup> U.S. CONST. art I, § 8, cl. 3.

<sup>10</sup> *Nat'l Fed. Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). This decision, however, also struck down the ACA's mandatory Medicaid expansion, making it optional for each state. That decision continues to leave 2 million low-income Americans without health insurance; Rachel Garfield, Kendal Orgera & Anthony Damico, *The Coverage Gap: Uninsured Poor Adults in States that Do Not Expand Medicaid*, KAISER FAMILY FOUNDATION (Jan. 14, 2020).

<sup>11</sup> *King v. Burwell*, 576 U.S. 988 (2015).

<sup>12</sup> See Dodge, *supra* note 8.

the other ACA provisions must be struck down without the mandate. This argument ignores the superseding intent of the 2017 Congress which eliminated the mandate tax penalty while affirmatively maintaining the rest of the ACA, as well as basic rules of severability analysis that require us to look at the intent of the 2017 Congress, not the 2010 Congress.<sup>13</sup>

In a departure from their traditional institutional duty to defend federal legislation in court, Department of Justice lawyers agreed with the Republican attorneys general and refused to mount a defense of the ACA in court.<sup>14</sup> The principal defense of the law therefore fell to a group of Democratic state attorneys general who intervened in the suit in 2017. They were later joined in defending the law by the U.S. House of Representatives in January 2019.

In December 2018, Judge Reed O'Connor of the Northern District of Texas held, in a decision stayed pending appellate resolution, that the law must be struck down entirely.<sup>15</sup> Judge O'Connor held that under the Chief Justice's reasoning in *NFIB*, because there was no longer a tax penalty, the individual mandate was now unconstitutional. Furthermore, because both the 2010 Congress and the Supreme Court in *NFIB* and *King* stated that the individual mandate was "essential" to the ACA, he held that the rest of the law was inseverable and must be struck down, too.<sup>16</sup>

In December 2019, in a 2-1 decision, a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit affirmed the district court decision and held the individual mandate unconstitutional.<sup>17</sup> The Fifth Circuit's decision displayed open hostility to the ACA, speculating that the law may have been "enacted as part of a fraud on the American people, designed to ultimately lead to a federal, single-payer health-care system."<sup>18</sup> While it did not resolve the severability issue, the Fifth Circuit nevertheless suggested that much of the rest of the law — its protections for people with pre-existing conditions, its health exchanges, the Medicaid expansion, and more — could fall too upon closer inspection by the district court. The Fifth Circuit did, however, recognize that the district court gave "relatively little attention to the intent of the 2017 Congress" — that is, the Congress that amended the ACA by eliminating the

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<sup>13</sup> *Regan v. Time, Inc.*, 468 U.S. 641, 652-55 (1984) (plurality opinion).

<sup>14</sup> Nicholas Bagley, *Texas Fold 'Em*, INCIDENTAL ECONOMIST (June 7, 2018), This was so unusual that it prompted career DOJ attorneys to pull their names off of the brief, including one who even quit the Department entirely in protest.

<sup>15</sup> *Texas v. United States*, 340 F.Supp.3d 579 (N.D. Tex. 2018).

<sup>16</sup> The reason that both the individual mandate (now with a \$0 tax penalty) and the 2010 legislative findings remain in the statute is that those provisions could not be amended through budget reconciliation. And Congress was forced to amend the ACA through budget reconciliation in 2017 because it did not have the votes to repeal non-budgetary provisions. Judge O'Connor did not address the crucial distinction that the 2010 Congress and the Supreme Court were evaluating an individual mandate *backed up by an enforceable tax penalty*. That is very different from the post-TCJA residual "mandate" which has no tax penalty behind it.

<sup>17</sup> *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019).

<sup>18</sup> *Id.* at 370 n.3; see also Joel Dodge, *How the GOP broke ObamaCare — and the federal judiciary*, WEEK (Dec. 20, 2019).

individual mandate tax penalty – “which appears in the analysis only as an afterthought[.]”<sup>19</sup> The “afterthought” paid to the 2017 Congress’s intent, of course, ought to be determinative – for that is the Congress that amended the ACA by zeroing out the mandate tax penalty while leaving the rest of the law intact.

Nevertheless, the Fifth Circuit sent the case back to the district court to reconsider which provisions – if any – of the ACA could be salvaged without the mandate. Before that could happen, the intervenors defending the ACA asked the U.S. Supreme Court to review the Fifth Circuit’s decision. In March 2020, the Supreme Court agreed to hear the case and yet again decide the fate of the ACA.

## II. Severability: The Key Question in *California v. Texas*

When one provision of a law is found to be unconstitutional, courts must determine whether the offending provision can be “severed” from the rest of the law.<sup>20</sup> The heart of this severability determination is a question of legislative intent: Would Congress want the rest of the law to survive without the stricken provision? As Chief Justice Roberts wrote in *NFIB*:

“Our touchstone . . . is legislative intent, for a court cannot use its remedial powers to circumvent the intent of the legislature. [. . .] The question here is whether Congress would have wanted the rest of the Act to stand [without the unconstitutional provision]. Unless it is ‘evident’ that the answer is no, we must leave the rest of the Act intact.”<sup>21</sup>

The Supreme Court reiterated this basic principle last Term, holding that “the traditional rule is that ‘the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.’”<sup>22</sup>

When the Court undertakes a severability inquiry, the best way to “determine[] what Congress would have done” is “by examining what it did.”<sup>23</sup> The Court must consider the intent of the Congress that created the constitutional problem – and not that of some earlier Congress – to determine whether the legislature would prefer “what is left of” the statutory scheme without the unconstitutional provision, versus having “no statute at all.”<sup>24</sup> For example, when the Supreme Court struck down a 1958 amendment to a Civil War-era anti-counterfeiting statute,

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<sup>19</sup> *Id.* at 400.

<sup>20</sup> See generally David Gans, *To Save and Not to Destroy: Severability, Judicial Restraint, and the Affordable Care Act*, AMERICAN CONSTITUTION SOCIETY (Dec. 4, 2019).

<sup>21</sup> Nat’l Fed. Indep. Bus. v. Sebelius, 567 U.S. 519, 586-587 (2012).

<sup>22</sup> *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S.Ct. 2183, 2209 (2020) (quoting *Alaska Airlines, Inc. v. Brock*, 480 U. S. 678, 685 (1987)).

<sup>23</sup> *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 560 (2001) (Scalia, J., dissenting).

<sup>24</sup> *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330 (2006).

its severability inquiry focused on the preferences and intent of the 1958 Congress that amended the law, rather than the Congress that originally enacted it.<sup>25</sup>

In *California v. Texas*, the critical question therefore is: Did the 2017 Congress want the rest of the ACA – its protections for preexisting conditions, Medicaid expansion, insurance subsidies, continued parental insurance coverage for young adults, and the rest – to survive without the individual mandate?

Fortunately for the Supreme Court, there is no need to mind-read in this case. Throughout 2017, Congress repeatedly expressed its intent not to repeal major components of the ACA. When it succeeded in effectively repealing the individual mandate tax penalty, that action was accompanied by unanimous and uncontested statements of legislative intent that the rest of the ACA, including its protections for pre-existing conditions, would be retained. As discussed in detail below, given the repeated votes cast in Congress in the run-up to the repeal of the individual mandate, and the close public attention paid to the votes of key legislators, it is hard to imagine any case presenting the Court with clearer evidence of intent for a severability inquiry. A ruling in favor of the respondents in *California v. Texas* would contradict clear expressions of legislative intent and usurp legislative power by decimating the deal that Congress painstakingly landed upon in 2017.

### III. Congress Rejected Obamacare Repeal, and Settled for Individual Mandate Repeal

When it enacted the TCJA, Congress did not intend for the rest of the ACA to fall. Throughout 2017, Congress considered and rejected numerous bills that would have repealed key provisions of the ACA. When it ultimately took the narrower path of eliminating the mandate's tax penalty, senators across the political spectrum unanimously and uncontestedly made statements demonstrating their expectation and intent that the rest of the ACA would continue forward unimpeded. Indeed, after the Fifth Circuit's decision striking down the individual mandate, **Senator Lamar Alexander** – who is no champion of the ACA – issued a statement saying: "I am not aware of a single senator who said they were voting to repeal Obamacare when they voted to eliminate the individual mandate penalty."<sup>26</sup>

#### A. Congress Considered and Rejected a Series of Bills Repealing Key Provisions in the ACA

Congress tried repeatedly to repeal the ACA throughout 2017. A close reading of the legislative history reveals that Congress steadily narrowed the scope of its repeal effort due to insufficient

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<sup>25</sup> *Regan v. Time, Inc.*, 468 U.S. 641, 652-55 (1984) (plurality opinion).

<sup>26</sup> [Press Release](#), Sen. Lamar Alexander, Alexander Statement on Texas v. Azar Court Case Decision (Dec. 18, 2019).

legislative support to undermine the major provisions of the ACA that the attorneys general and Department of Justice now argue are inseverable from the mandate penalty.

Congress began laying the groundwork for its 2017 effort to repeal the ACA in December 2015. While congressional Republicans repeatedly considered and passed bills attempting to repeal the ACA during the Obama administration, the 2015 Reconciliation Bill was the first to attempt to repeal the ACA through the budget reconciliation process.<sup>27</sup> Budget reconciliation allows for expedited consideration of tax and spending legislation. Reconciliation bills are not subject to the Senate filibuster, meaning they need only a simple majority to pass, instead of the customary sixty votes. However, the scope of a reconciliation bill is limited: it can only include provisions related to the federal budget. Under the Senate's Byrd Rule, provisions that do not affect federal spending are subject to removal by the Senate parliamentarian.<sup>28</sup>

The 2015 Reconciliation Bill would have rolled back large parts of the ACA, including eliminating the individual mandate tax penalty and phasing out both the Medicaid expansion and the private insurance marketplace subsidies. Although President Obama vetoed the legislation, the ACA-related provisions survived the Senate parliamentarian's review under the Byrd Rule. In so doing, Congress established a blueprint to repeal the ACA on a simple majority vote. In fact, the 2015 Reconciliation Bill was understood at the time to be a "test run" for a future repeal effort after a change in presidential administrations.<sup>29</sup> Thus, Congress knew how to repeal the bulk of the ACA through reconciliation if it wanted to.

Days after the 2016 election, Speaker of the House Paul Ryan pointed to the 2015 Reconciliation Bill as the probable model for ACA repeal. "This Congress, this House majority, this Senate majority has already demonstrated and proven we're able to pass that legislation and put it on the president's desk," he said. "The problem is President Obama vetoed it. Now, we have President Trump coming who is asking us to do this."<sup>30</sup>

The first approach to repeal the ACA floated by congressional leadership in the Trump era was a so-called "repeal and delay" strategy, whereby Congress would pass a repeal bill substantially similar to the 2015 Reconciliation Bill, delay its effective date for up to two years, and in the

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<sup>27</sup> Restoring Americans' Healthcare Freedom Reconciliation Act, H.R. 3762, 116th Cong. (2019).

<sup>28</sup> David Reich & Richard Kogan, *Introduction to Budget "Reconciliation"*, CTR. ON BUDGET AND POLICY PRIORITIES (Nov. 9, 2016).

<sup>29</sup> See, e.g., Rachel Roubein, *The GOP's Obamacare Repeal Work Is Done—For Now*, ATLANTIC (Jan. 6, 2016), (reporting that the vote "serv[ed] as a 'test run' for what happens if a Republican wins the White House (and both chambers remain in GOP hands)"); John McCormack, *For the First Time, Senate Passes Bill Repealing Obamacare and Defunding Planned Parenthood*, WASH. EXAMINER (Dec. 4, 2017), ("[The] vote was an important test-run for Republicans[ ]" because "[n]ow Republicans know that they can repeal almost all of Obamacare with a simple majority in the Senate.").

<sup>30</sup> Katie Reilly, *Read Paul Ryan's Speech Calling Donald Trump's Victory the 'Most Incredible Political Feat,'* TIME (Nov. 9, 2016).

interim design and pass a more conservative replacement.<sup>31</sup> Even from the start of Congress’s 2017 repeal effort, there was no legislative appetite to throw out the ACA’s coverage expansion without first having a replacement system in place.

However, in January 2017, President-elect Trump rejected the repeal-and-delay approach, insisting that repeal and replace happen simultaneously.<sup>32</sup> The House of Representatives adjusted accordingly, and began working on a single piece of legislation to repeal and replace the ACA. This ultimately became the American Health Care Act (“AHCA”), which the House narrowly passed 217-213 on May 4, 2017.<sup>33</sup> Among other changes to the ACA, the AHCA would have eliminated the individual mandate penalty, repealed the Medicaid expansion, and eliminated income-based insurance subsidies.

After the AHCA passed the House, the Senate declined to take up the bill. This was in part because the Congressional Budget Office (CBO) projected that the bill would cause twenty-four million people to lose insurance and cause significant increases in out-of-pocket health care costs.<sup>34</sup> Instead, the Senate produced its own legislation to repeal and replace the ACA, known as the Better Care Reconciliation Act (“BCRA”).<sup>35</sup> The BCRA would have eliminated the individual mandate penalty, repealed the Medicaid expansion, and substantially reduced the ACA’s income-based insurance subsidies.

In late July 2017, the Senate took a series of votes on various ACA repeal bills. First, on July 23, the Senate voted 43-57 to reject the BCRA.<sup>36</sup> Next, the Senate took up the Obamacare Repeal and Reconciliation Act (“ORRA”), known as “clean repeal” because it would have repealed major provisions of the ACA – including the individual mandate tax penalty, the Medicaid expansion, and the individual insurance subsidies – with no replacement.<sup>37</sup> On July 26, 2017, the Senate voted 45-55 to reject the ORRA.<sup>38</sup>

Finally, the Senate took up the Health Care Freedom Act (“HCFA”), known as “skinny repeal” because it was the narrowest of the ACA repeal iterations considered by the Senate.<sup>39</sup> The HCFA would have retained much of the ACA’s structure, while eliminating the individual mandate tax penalty. It also contained additional provisions, such as prohibiting federal

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<sup>31</sup> See Jennifer Haberkorn, *Republicans aim to start Obamacare repeal in January*, POLITICO (Nov. 16, 2016).

<sup>32</sup> Bruce Jepsen, *Trump ‘Just Killed’ Paul Ryan’s Obamacare Repeal-And-Delay Strategy*, FORBES (Jan. 11, 2017).

<sup>33</sup> American Health Care Act of 2017, H.R. 1628, 115th Cong. (2017).

<sup>34</sup> See Sarah Kliff, *CBO Estimates 24 Million Lose Coverage Under GOP Plan. The Devastating Report, Explained*, VOX (Mar. 13, 2017).

<sup>35</sup> Better Care Reconciliation Act of 2017, S. AMEND. 270, 115th Cong. (2017).

<sup>36</sup> Thomas Kaplan & Robert Pear, *Senate Votes Down Broad Obamacare Repeal*, N.Y. TIMES (July 25, 2017).

<sup>37</sup> Obamacare Repeal Reconciliation Act of 2017, S. AMEND. 271, 115th Cong. (2017).

<sup>38</sup> Thomas Kaplan & Eileen Sullivan, *Health Care Vote: Senate Rejects Repeal Without Replace*, N.Y. TIMES (July 26, 2017).

<sup>39</sup> Health Care Freedom Act of 2017, S. AMEND., 667, 115th Cong. (2017).

funding for Planned Parenthood and eliminating the ACA's requirement that most large employers provide health insurance to employees.<sup>40</sup>

On July 28, the Senate voted 49-51 to reject the HCFA. It was a near party-line vote, with Republican Senators John McCain, Susan Collins, and Lisa Murkowski casting the decisive votes, joining all 48 Democrats in voting against the bill.<sup>41</sup> With even that narrowest iteration of the ACA repeal voted down, the 115th Congress's repeal effort ended.<sup>42</sup>

## B. Congress Eliminated the Individual Mandate Tax Penalty to Fund other Tax Reductions

After failing to repeal the ACA, Congress turned its focus to tax reform. To fund some of its proposed tax cuts, Congress targeted the ACA's individual mandate tax penalty. Eliminating the mandate's tax penalty was expected to save the government \$338 billion over ten years based on CBO projections.<sup>43</sup> This projected savings was the result of an estimated thirteen million fewer people who would be covered by Medicaid, subsidized ACA health exchange plans, and other federally-funded health care programs. The CBO projections went on to estimate that by 2027, without the mandate penalty, five million fewer people would be covered by Medicaid and five million fewer people would be insured on ACA health exchange plans and other individual insurance plans.<sup>44</sup>

Moreover, those same projections also determined that even without the individual mandate tax penalty, "[n]ongroup insurance markets would continue to be stable in almost all areas of the country throughout the coming decade."<sup>45</sup> Therefore, the projections Congress relied upon when eliminating the mandate tax penalty anticipated that the rest of the ACA would remain valid and workable.

The individual mandate tax penalty thus presented Congress with a \$338 billion pool of savings to draw from to fund new tax cuts. Importantly, those savings represented a projected future where enrollment in the ACA's programs would be reduced but not eliminated. The CBO – and ultimately, Congress itself – presumed that even without the tax penalty, millions of Americans

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<sup>40</sup> CONG. BUDGET OFF., H.R. 1628, THE HEALTHCARE FREEDOM ACT OF 2017, AN AMENDMENT IN THE NATURE OF A SUBSTITUTE [S. AMEND. 667] (July 27, 2017).

<sup>41</sup> 115 CONG. ROLL CALL VOTE 1st Session (July 28, 2017).

<sup>42</sup> Repeal efforts were briefly revived in September 2017 in a bill proposed by Senators Lindsey Graham and Bill Cassidy. However, Senate leadership declined to hold a vote on the Graham-Cassidy bill after three Republican senators publicly announced that they would vote against it (Senators McCain, Collins, and Rand Paul). Dan Mangan, *Senate Will Not Vote on Obamacare Repeal Bill, Killing Chances of Health-Care Reform This Year*, CNBC (Sept. 26, 2017).

<sup>43</sup> CONG. BUDGET OFF., REPEALING THE INDIVIDUAL HEALTH INSURANCE MANDATE: AN UPDATED ESTIMATE (2017).

<sup>44</sup> *Id.*; CONG. BUDGET OFF., FEDERAL SUBSIDIES FOR HEALTH INSURANCE COVERAGE FOR PEOPLE UNDER AGE 65: 2017 TO 2027 (2017).

<sup>45</sup> CONG. BUDGET OFF., *Supra* note 43.

would continue to be insured under the ACA. The implication, of course, is that Congress intended for the ACA to continue even without the mandate tax penalty.<sup>46</sup> Had Congress expected the total elimination of core elements of the ACA, such as its subsidized exchange plans and Medicaid expansion, the pool of potential savings available to Congress would have been much larger, and could have been sufficient to fund significant additional tax cuts.

### C. No Senator Intended for the Tax Cuts and Jobs Act to Invalidate the ACA

The TCJA – including the provision eliminating the ACA’s individual mandate tax penalty – passed the House of Representatives on November 16, 2017.<sup>47</sup> On December 1, 2017, the TCJA passed the Senate by a 51-49 vote. Like the HCFA “skinny repeal” vote in July, the TCJA produced a near party-line vote, with only Republican Senator Bob Corker joining all Senate Democrats in opposing the bill. Again, Senators McCain, Collins, and Murkowski cast the decisive votes, collectively switching from voting “no” on the HCFA to voting “yes” on the TCJA.<sup>48</sup>

Among those senators who supported the TCJA and spoke publicly about eliminating the ACA’s individual mandate tax penalty, not a single one demonstrated any intent or expectation that the TCJA would eliminate the rest of the ACA. To the contrary, the clear legislative intent was to preserve the rest of the ACA without the mandate tax penalty.

A review of contemporaneous public statements by key senators – including those who cast the decisive votes to pass the TCJA and others who preferred repeal of the ACA in its entirety – demonstrates that Congress presumed and intended for the rest of the ACA to continue unimpeded:

- **Senator Tom Cotton** originally proposed eliminating the mandate tax penalty in the TCJA.<sup>49</sup> On November 15, 2017, he spoke on the Senate floor in support of his proposal: “Let’s just think about what the mandate repeal does. It doesn’t cut a single dime out of Medicaid. It doesn’t cut a single dime out of insurance subsidies for people on the exchanges, and it doesn’t change a single regulation of Obamacare. All it says is the IRS

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<sup>46</sup> Cf. Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways That Courts Can Improve on What They Are Already Trying to Do*, 84 CHI. L. REV. 177, 182 (2017) (proposing a “CBO Canon” of statutory construction whereby “statutes should be interpreted in accordance with the reading of the statute adopted by the Congressional Budget Office (CBO) in calculating its budgetary impact”).

<sup>47</sup> Thomas Kaplan & Alan Rappeport, *House Passes Tax Bill, as Does Senate Panel*, N.Y. TIMES (Nov. 16, 2017).

<sup>48</sup> Jim Tankersley, Thomas Kaplan & Alan Rappeport, *Senate Republicans Pass Sweeping Tax Bill*, N.Y. TIMES (Dec. 1, 2017).

<sup>49</sup> Seung Min Kim & Jennifer Haberkorn, *How Cotton Brought Obamacare Repeal Back From the Dead*, POLITICO (Nov. 15, 2017).

cannot fine you for being unable to afford the insurance that Obamacare made unaffordable in the first place.”<sup>50</sup>

- **Senator John Barrasso** made a statement on December 19, 2017, after the TCJA went through conference committee with the House of Representatives, stating, “It doesn’t take away anyone’s insurance [ . . . ] It just says that nobody should have to pay an extra tax[.]”<sup>51</sup>
- **Senate Majority Whip John Cornyn** made a floor statement on November 27, 2017, assuring that under the TCJA, “no one is being kicked off of their health insurance coverage.”

Senator Cornyn pointed to the Bipartisan Health Care Stabilization Act introduced by Senators Lamar Alexander and Patty Murray (“Alexander-Murray”) which offset some of the expected insurance premium increases for individuals on the ACA marketplaces caused by the TCJA. Senator Cornyn presumed that the ACA would continue, saying that the Alexander-Murray proposal would “reduc[e] the deficit by \$3.8 billion over the next ten years. That is why this proposal deserves our serious consideration, and I hope we will turn to it following our debate and vote on the Senate’s tax reform bill.”<sup>52</sup>

- **Senator Ted Cruz**, an ardent opponent of the ACA who led a government shutdown in 2013 in an attempt to force repeal of the law,<sup>53</sup> wrote a blog post on his Senate website on November 18, 2017, conceding that the TJCA did not go all the way toward repealing the ACA: “I was also pleased to see the Senate incorporate one of my top priorities, repealing Obamacare’s individual mandate, in our tax reform bill[.] [ . . . ] While this is only a first step in undoing the disaster [sic] that is Obamacare, it is a critical step in the right direction.”<sup>54</sup>
- **Senator Orrin Hatch** made a floor statement on November 29, 2017, stating: “I expect we will hear that, by repealing the individual mandate tax, the bill will be taking people’s health insurance away and raising taxes on the poor. That claim will be made despite confirmation from congressional scorekeepers that nothing – nothing – in the bill removes or limits anyone’s access to health insurance. . . This bill provides choice. It doesn’t take anything away from those individuals . . . [who rely on] premium subsidies, employer-provided plans, or even free health coverage through Medicaid. . . [N]o one

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<sup>50</sup> 163 Cong. Rec. 187, S7229 (statement of Sen. Cotton) (emphasis added).

<sup>51</sup> [News Release](#), Sen. John Barrasso, Congress is Set to Pass Historic Tax Relief Bill (Dec. 19, 2017).

<sup>52</sup> 163 CONG. REC. 192, S7319 (daily ed. Nov. 27, 2017).

<sup>53</sup> Manu Raju, *Government shutdown 2013: Some GOP colleagues angry with Ted Cruz*, POLITICO (Oct. 2, 2013).

<sup>54</sup> Sen. Ted Cruz, *Cruz News*, TED CRUZ PRESS OFFICE BLOG (Nov. 18, 2017) (emphasis added).

will lose their health insurance under this bill when the mandate is repealed. . . We are not kicking anyone off their insurance by zeroing out the individual mandate penalty.”<sup>55</sup>

- **Senator John McCain**, who opposed the HCFA, made a statement on November 30, 2017 announcing his support for the TCJA: “By repealing the individual mandate, this bill would eliminate an onerous tax that especially harms those from low-income brackets.”<sup>56</sup> He did not identify any other changes to the ACA that would be caused by the TCJA.
- **Senator Lisa Murkowski**, who also opposed the HCFA, voted in favor of the TCJA. She distinguished these bills by explaining that the HCFA repealed “far more [of the ACA] than the individual mandate.”<sup>57</sup> Senator Murkowski also simultaneously supported the Alexander-Murray bill. In a November 29, 2017, statement announcing support for the tax bill, she added: “[W]e must enact healthcare reforms to help stabilize the individual market. The Alexander-Murray bill helps to accomplish that.”<sup>58</sup>
- **Senator Shelley Moore Capito** made a floor statement on November 29, 2017, stating: “There has been a lot of misinformation about this provision, so let me just clarify. No one is being forced off of Medicaid or a private health insurance plan by the elimination of the individual mandate. By eliminating the individual mandate, we are simply stopping penalizing and taxing people who either cannot afford or decide not to buy health insurance plans.”<sup>59</sup>
- **Senator Tim Scott** made a floor statement on December 1, 2017, shortly before voting on the TCJA, stating that the TCJA “take[s] nothing at all away from anyone who needs a subsidy, anyone who wants to continue their coverage – it does not have a single letter in there about preexisting conditions or any actual health feature.”<sup>60</sup>
- **Senator Pat Toomey** made a floor statement on December 1, 2017, shortly before voting on the TCJA, stating: “We don’t change any of the [ACA’s] subsidies. They are all available to anyone who wants to participate. We don’t change the rules. We don’t change eligibility. We don’t change anything except one thing. We say that if you decide this plan doesn’t fit your family or if you decide for all the subsidies you get it is still not

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<sup>55</sup> 163 CONG. REC. 194, S7370 (statement of Sen. Hatch).

<sup>56</sup> Tim Fernholz, *John McCain Will Vote “yes” on Tax Reform. His Reasons Don’t Add Up*, QUARTZ (Nov. 30, 2017).

<sup>57</sup> Robert King, *Susan Collins, Lisa Murkowski Defend Opposition to Individual Mandate*, WASHINGTON EXAMINER (Nov. 30, 2017).

<sup>58</sup> [Press Release](#), Sen Lisa Murkowski, Senator Murkowski Statement on Senate Tax Reform Legislation (Nov. 29, 2017).

<sup>59</sup> 163 CONG. REC. 194, S7380 (daily ed. Nov. 29, 2017).

<sup>60</sup> 163 CONG. REC. 196, S7655 (daily ed. Dec. 1, 2017).

worth it for you to have this plan and you opt out, you will no longer be punished with this tax. That is the only thing we do in this bill.”<sup>61</sup>

Finally, special attention is warranted for **Senator Susan Collins**. Like Senators McCain and Murkowski, Senator Collins opposed the HCFA and supported the TCJA, and thus was one of the decisive votes to eliminate the individual mandate tax penalty. Like Senator Murkowski, she distinguished these bills by explaining: “The [HCFA] skinny repeal bill had many other provisions in it. It repealed the employer mandate, eliminated funding for Planned Parenthood and had many other provisions and so it is not comparable at all [to the TCJA].”<sup>62</sup>

Because her vote in favor of the tax cuts in the TCJA would jeopardize the stability of the ACA, Senator Collins also simultaneously endorsed the Alexander-Murray bill to provide support to the ACA’s individual insurance marketplaces.<sup>63</sup> In a colloquy on the Senate floor on December 1, 2017, just before voting on the TCJA, Senator Collins encouraged the Senate to pass the Alexander-Murray bill, saying that she “believe[d] that it is imperative that Congress take action to mitigate this likely premium increase” on the ACA marketplaces after eliminating the mandate tax penalty.

In response, **Senate Majority Leader Mitch McConnell** said: “I agree that Alexander-Murray can help provide certainty and flexibility for State insurance markets in the absence of the mandate and will support passage of the Bipartisan Health Care Stabilization Act.”<sup>64</sup>

Senator Collins thus made her vote in support of the TCJA contingent on legislation that would mitigate potential premium increases on the ACA marketplaces. This, of course, presumed that the ACA marketplaces would continue to operate even without the mandate tax penalty. Majority Leader McConnell’s agreement to her request indicates that he secured critical support for the TCJA based on their shared assumption that the ACA would otherwise continue as normal without a tax penalty for those without insurance.

In a separate statement announcing her support for the TCJA, Senator Collins stated: “I was deeply concerned that the repeal of the individual mandate would almost certainly lead to further increases in the cost of health insurance premiums. . . I am very pleased the Majority Leader committed to support passage of . . . legislation before the end of the year to mitigate these increases. . . [T]he Bipartisan Health Care Stabilization Act introduced by Senators Alexander and Murray, will provide vital funding in 2019 and 2020 for the cost-sharing

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<sup>61</sup> *Id.*

<sup>62</sup> King, *supra* note 58.

<sup>63</sup> Alice Ollstein, *How Susan Collins Came Around On Killing The Individual Mandate*, TPM (Nov. 29, 2017).

<sup>64</sup> CONG. REC. *supra* note 61. Senator Collins also elicited a similar assurance from Sen. McConnell that the Senate would take up separate legislation to fund state-based high-risk pools for individuals with preexisting conditions.

reductions received by low-income enrollees in the ACA exchanges.”<sup>65</sup> She thus plainly foresaw the core of the ACA continuing forward into the future even in the absence of the individual mandate tax penalty.<sup>66</sup>

Moreover, after the TCJA went through conference with the House, Senator Collins said there was a “big difference” between the TCJA and the “bills considered last summer and fall that would have taken away insurance coverage” and “made sweeping cuts in the Medicaid program.”<sup>67</sup>

Senators opposed to the TCJA warned that eliminating the mandate penalty would destabilize the ACA, raise insurance premiums, and cost people their coverage, but not a single one warned that doing so would render the ACA unworkable, let alone trigger its effective repeal in court. Given the high-intensity battles surrounding the 2017 Congress’s efforts to repeal the ACA, it seems reasonable that at least one senator would have levied this politically-salient attack against the TCJA if anyone thought it could conceivably lead to the wholesale invalidation of the health care law. That no one did speaks volumes about the shared assumptions and intent of the 2017 Congress. Moreover, Congress continued passing legislation funding and amending programs under the ACA even after passing the TCJA, including repealing the law’s Cadillac tax on high-end health insurance plans and its tax on medical devices.<sup>68</sup> As the Supreme Court has held, “[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction.”<sup>69</sup> Congress’s post-TCJA legislative activity therefore makes clear that it did not intend for the elimination of the mandate tax penalty to revoke other provisions of the ACA.

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<sup>65</sup> [Press Release](#), Sen. Susan Collings, Senator Collins Secures Significant Changes to Support Hard-Working Lower- and Middle-Income Families (Dec. 1, 2017).

<sup>66</sup> Months later, negotiations around the Alexander-Murray bill broke down after Senate Republicans and the White House inserted new language -- with Senator Collins’s support -- that would deny insurance coverage for abortion for people who purchase their insurance through the ACA marketplaces. The bill was never put to a vote. See Adam Cancryn & Jennifer Haberkorn, *Inside the Collapse of a Bipartisan Obamacare Deal*, POLITICO (Mar. 26, 2018).

<sup>67</sup> 163 CONG. REC. 206, S8054 (daily ed. Dec. 18, 2017). In April 2019, Senator Collins wrote a letter to Attorney General Bill Barr objecting to the Department of Justice’s refusal to defend the ACA in the Fifth Circuit, writing: “It is implausible that Congress intended protections for those with preexisting conditions to stand or fall together with the individual mandate, when Congress affirmatively eliminated the penalty while leaving these and other critical consumer protections in place. If Congress had intended to eliminate these consumer protections along with the individual mandate, it could have done so. It chose not to do so.” [Press Release](#), Sen. Susan Collins, Senator Collins Urges DOJ to Defend ACA’s Protections for Pre-Existing Conditions and Other Critical Consumer Protections (Mar. 31, 2019).

## IV. Conclusion

Congress doesn't hide elephants in mouseholes. This means that Congress typically doesn't make major changes to the law in obscure statutory crevices.<sup>70</sup> A corollary is that Congress doesn't kill elephants in mouseholes, either. If Congress wanted to repeal the biggest expansion of health care coverage enacted in a half-century, a revenue provision in a tax reform bill is an awfully odd place to do it, especially after a failed ACA repeal effort that consumed most of the year's legislative oxygen and stirred massive public controversy.

The Supreme Court should not assign such an improbable – and outright anti-democratic – intent to Congress in the absence of even one iota of evidence. “Constitutional litigation is not a game of gotcha against Congress, where litigants can ride a discrete constitutional flaw in a statute to take down the whole, otherwise constitutional statute.”<sup>71</sup> If Congress decided to trigger full repeal of the ACA in a tax bill, someone in Congress would have sounded the alarm. Admittedly, legislative history can be a mixed bag, but rarely is the evidence of legislative intent so overwhelming. There simply is no evidence that Congress intended to repeal the bulk of the ACA when it enacted the TCJA. Perhaps this is why forty-seven Democratic members of the U.S. Senate filed an amicus brief at the Supreme Court explaining that the legislative history around the repeal of the individual mandate tax penalty demonstrates Congress's intent to retain the rest of the ACA, and not a single Republican senator filed any brief in response to argue otherwise.

If the Supreme Court finds the individual mandate unconstitutional, under its own precedent the crucial question is whether the 2017 Congress intended for the rest of the ACA to stand. “Unless it is ‘evident’ that the answer is no,” the Court “must leave the rest of the Act intact.”<sup>72</sup> Moreover, it must “use a scalpel rather than a bulldozer [to] cur[e] [any] constitutional defect” with the ACA after it was amended by the tax reform bill.<sup>73</sup>

Here, it is evident that the rest of the ACA should stand. Congress left nothing to the Court's imagination, electing to retain the ACA while effectively repealing the mandate tax penalty in close succession.

That plain legislative intent should be decisive when the Supreme Court takes up the consequences of repealing the individual mandate penalty. The backdoor repeal attempted by the Trump administration and the Republican attorneys general bringing this lawsuit requires a complete rewriting of history and a disregard for Congress as a co-equal branch of government. Simply put, this would be a breathtaking judicial bailout for the opponents of the ACA, awarding them with a policy victory that they lacked the votes to achieve through the

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<sup>70</sup> [Whitman v. American Trucking Assn's.](#), 531 U.S. 457 (2001).

<sup>71</sup> [Barr v. Am. Ass'n of Political Consultants](#), 140 S. Ct. 2335, 2351 (2020) (opinion of Kavanaugh, J.).

<sup>72</sup> [Nat'l Fed. Indep. Bus. v. Sebelius](#), 567 U.S. 519, 587 (2012).

<sup>73</sup> [Seila Law LLC v. Consumer Fin. Prot. Bureau](#), 140 S.Ct. 2183, 2210-2211 (2020).

democratic process. Yet if facts, common sense, and judicial humility manage to overcome ideology, the health care that millions of Americans rely on ought to remain secure.

## About the Author

Joel Dodge is a Staff Attorney at the Center for Reproductive Rights. He is a member of the Center's Judicial Strategy team, working on innovative legal strategies to advance the current reproductive rights framework. He previously was an associate at Stroock & Stroock & Lavan LLP, where he worked on a wide range of civil litigation and pro bono matters. He helped author an amicus brief to the Supreme Court in *Whole Women's Health v. Hellerstedt* on behalf of 163 Members of Congress and helped develop the argument defending the Affordable Care Act in *King v. Burwell* in an amicus brief to the Supreme Court that was referenced by several justices during oral argument. Dodge is a Lecturer in Law at Columbia Law School and serves as a Co-Chair of the American Constitution Society's New York Lawyer Chapter. Dodge received his B.A. from the State University of New York at Geneseo and his J.D. from Boston University.

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