**Children's Health Coverage Coalition and OTA Meeting Agenda**
Friday, January 18th, 2019
11:00 A.M. – 1:00 P.M.

**Present:**

Anne Dunkelberg, CPPP
Laura Guerra-Cardus, CDF
Helen Kent Davis, TMA
Alison Boleware, TMA
Mary Allen, TACHC

**On Conference Line:**

Linda Hendry, Maximus
Leah Gonzalez, HFT &TWHC
Erika Ramirez, HFT &TWHC
Sarah Gonzalez, THA

Meeting Chair: Clayton Travis, Texas Pediatric Society

Meeting Scribe: Arinda Rodriguez, CPPP

## I. Introductions (Clayton Travis, 5 minutes)

Committee announcements will be given out next week.

We are still collecting signatures for our legislative priorities and we will be having our legislative brief next week. If you would like your organization to be listed as a supporter of our agenda, please email Arinda Rodriguez.

## II. House and Senate Bill 1 (Clayton Travis, 30 minutes)

[Clayton Travis, TPS]

[Refer to Eva de Luna Castro blog]

CPPP was encouraged to see that the budgets were not that far apart. House proposes a budget about $115 billion in general revenue while the Senate proposes $112 billion, which is about half of the full budget.

The House proposes using $633 million dollars of the rainy day fund in 2020-2021, with a third of that money going to retired teachers.

The Senate proposed using $2.5 billion from the rainy day fund, where $1.2 billion would be allocated for Hurricane Harvey costs. $711 million would be used for additional budget items.

It's a good sign that lawmakers are willing to tap the rainy day fund. The fund is growing at unprecedented levels, and we will have $15 billion as it grows in the future. The hope is that it will be used for Texas' critical needs.

Also, about $7.4 billion will be dedicated to public education under the House proposal. It is important to note that much of this money is dedicated to lowering the cost of property taxes to offset funding needed for schools. It may not be a big influx of money towards schools, but it's targeting the proportion between state and property taxes, which is a step in the right direction. The Senate budget proposes an across-the-board pay raise for public school teachers.

Regarding Medicaid, both bills are offering sufficient funding for case load growth. However, budget writers are not accounting for increases in healthcare costs. With Medicaid being an entitlement program, anything not funded this year, will need to be funded with supplemental appropriations to pay for costs not paid for last session.

So costs are not being covered, while healthcare prices keep going up, and lawmakers are currently not fully funding these programs.

[Anne Dunkelberg, CPPP]

Medicaid and chip funding caseload growth is covered, but additional costs are not.

Our match rate for 2020 will be better. The feds are going to pick up a bigger share of the costs, and that is good. The question is what the matching rate will be for 2021. The agency is being conservative and cautious and estimating that the match rate will be worse for that year, so there is uncertainty on that. When they write a budget, the second year of the biennial is always uncertain.

Also, the CHIP match rate is dropping. That was done by Congress last summer. The budget shows that right now in Texas. Because of the ACA, the feds are paying about 93 cents to CHIP money. That will be phasing out and going down by 11 percentage points.

I did get some talking points for this, I'll review them, and I'll try to send that around to the list in the next couple of days. The Republican majority congress voted to reduce match rate. The context is reminding people that change was anticipated.

[Clayton Travis, TPS]

Also, keep in mind that we may hear that we can't fund healthcare for kids because of public education funding.

Senate Finance will probably be meeting Tuesday, which is surprising because the membership hasn't even been announced.

[Helen Kent Davis, TMA]

Update on ECI: The HHSC special request is not included. After talking to house appropriations leaders, they said they wanted to have more discussion on ECI. They thought it was a little precipitated.

However, the House of Appropriations staff mentioned that ECI is a priority for the House, but more conversations are going to have to happen.

Clayton Travis is planning to meet with Senate Appropriations staff in the future, so contact him if you want to join them.

[Clayton Travis, TPS]

We are in the process of getting talking points for ECI.

**Maternal Health Update [Helen Kent Davis, TMA]**

There is some work with lawmakers, in both Senate and House, to find a path to improve coverage for pre-, during, and after conception for women. There's interest to do it, the question is how to do it. The most possible way to do it might be through a waiver, which might get approved by CMS. The vehicle to do the coverage isn't clear but there is interest. There is interest to provide auto-enrollment for adolescents aging out of Medicaid/CHIP. That does happen for women that get auto-enrolled in Healthy Texas Women (HTW).

One of the bills does say that if the adolescent is found pregnant at the time of losing Medicaid/CHIP, she would automatically transition into HTW.

Senate Finance also plays a role in moving forward with this.

We don't know where the Trump administration will be at this. This administration seems open to do it.

[Laura Guerra-Cardus, CDF]

True Medicaid expansion for women, would be ongoing coverage, these proposals are just to give coverage 12 months after delivery. Why does it necessarily have to be tied that way? Is there any flexibility in the current Medicaid?

[Anne Dunkelberg, CPPP]

No, it has to be a waiver.

We have a lot of waiver uncertainty which is double edged. Trump administration has approved a couple work requirements for working age adults (19-64 year olds) in several states. Some have been slowed down by legal challenges.

Also, Texas has requested to get federal matching funds for HTW by getting it through Medicaid, but is also excluding Planned Parenthood. That is an uncertainty decision. Trump administration may feel emboldened to pass something addressing that.

The word out in the street is that the administration is going to try and push out for states to get block grant style waivers. There's no details, which is why this might only be for special populations, but the theme is that there's a lot of uncertainty, and push back from the House might come out. There will be an ongoing struggle out of that. It's important to understand that the double edge of that is to see an adult coverage expansion, but this probably does soften the ground for some kind of conservative take for adult coverage.

[Helen Kent Davis, TMA]

There is no clear path

In the current 1115 waiver, the women's health waiver, the Trump administration is sending all these signals to ask whatever you want and we'll give you flexibility with the waivers.

It would probably be beneficial to write a bill to address this because there's uncertainty with the waivers.

[Clayton Travis, TPS]

Based on the Politico article, now that Chris Traylor is CMS chief, what was Chris's stance on block grants for current Medicaid populations?

[Anne Dunkelberg, CPPP]

I don't know that he would have been in a position where his personal opinion would come to the floor. His policies' roots were on the Asian disabled side. He has an understanding of the peril for fragile people dependent on Medicaid benefits, but it might be impossible to know his stance. There is some friendly access for Texas though.

We've had a lot of back and forth about the current state for the shortfall of the biennial that will fall on the supplemental funding. $2.1 billion was built into the Senate bill, but that number is constantly changing. Clayton mentioned the importance of school finance, in addition to plugging Eva De Luna Castro on social media, Chandra Villanueva is an expert on school finance as well. There is a special tool kit for school finance issues that is accessible to the public.

Our concern is that so much of the Medicaid budget has been pushed out our state budget to local governments. I think that is on a parallel trend to the big debate on school finance because the state needs to increase and maintain their funding.

It is not going to be enough to increase the funding, there has to be a revenue source for that.

Being sensitive to the importance of that and how we message and establish that school finance and children's health shouldn't be competing this session is also something to keep in mind.

[Clayton Travis, TPS]

Anything else on maternal health funding Helen?

[Helen Kent Davis, TMA]

There is a little bit of funding in the exceptional item requests.

From the women's health side, both budgets assumed that we will have a waiver approved. If we don't get the federal waiver, they can request money from LBB.

There is a reduction for women's health, under the assumption that we will have a waiver.

There are also concerns on the Riders about how they do allocation of funding.

[Erika Ramirez and Leah Gonzalez, HFT &TWHC]

Those are high level pieces, the House version has a slight decrease. The Senate comes at the same amount that they appropriated last time. They all approved the 1115 waver, but it is unclear of what will happen

We are watching to see, and move to educate people around the 1115 waiver.

The Family Planning Program is important and we don't want to see any cuts there.

[Clayton Travis, TPS]

Also, an X-ALD test screening was funded.

## III. Legislative Agenda Update (45 minutes)

<u>12 month CE [Laura Guerra-Cardus]</u>

We learned that they [HHSC] worked form older methodologies before periodic-income checks started. This time they are going to have better and more data.

They are going to be able to look into offsets and retro coverage.

Their guess is that they think it could be lower (fiscal note) but they can't make any guarantees.

[Clayton Travis, TPS]

There were minimal administrative savings from not doing the periodic income checks. The subscription services are basically free, so there are no "less" costs for not subscribing.

[Anne Dunkelberg, CPPP]

One of the things that was revealed for the first time was that they think that they confirmed what we suspected: they implemented this policy of taking the 6 months eligibility to do periodic income checks without ever analyzing the impact. They haven't figured how to calculate, and they think the flawed numbers we got previously were flawed because they couldn't distinguish between the automated and the ones that going to the agency worker to get additional information from the family. They are coming up with the system to differentiate, but the agency didn't monitor the effect the policy was having.

It's important that we don't villainize HHSC though, because that's not going to help us in any way. We just have to advocate with lawmakers saying the policy isn't working without trashing our friends at HHSC.

We need to get legislators fired up about this issue so they can go ahead and push for these policies.

It would be beneficial in our upcoming meetings with legislator staff to emphasize why this issue matters and that we need their help to convey the issues with such policies.

Helen were you able to secure a Republican sponsor to give more momentum to issues? What are you thinking about as strategy right now?

[Helen Kent Davis, TMA]

People are still waiting committee assignments.

[Laura Guerra-Cardus, CDF]

Is there any follow up we need to do with health plans so we can find sponsors?

[Helen Kent Davis, TMA]

We meet with them weekly, but I don't foresee issues when we request sponsors.

[Laura Guerra-Cardus, CDF]

Melissa and Anne at CPPP are working on a one-page for 12 CE with talking points that have been updated.

A piece of the argument is that eligible kids are losing coverage because of administrative red tape. Melissa, Christina and I have been trying to figure out a way to get the point across, and we think that we need to use stories that can elicit strong reactions on this issue. I will send an email to Arinda with stories and share them. It doesn't have to be the story of a family, we can also allow a caseworker and other people to be featured.

[Anne Dunkelberg, CPPP]

We will get those documents out soon.

[Clayton Travis, TPS]

Senate committees just got release

[Refer to Senate Committee Assignments document]

Arinda will send out full list of the senate committee listings.

[Anne Dunkelberg, CPPP]

Senator Pete Flores, is he too far to the right for us to expect him to be persuadable, provided his history that arguably a democrat should have won that seat?

[Clayton Travis, TPS]

He is still presenting himself as very conservative.

Lois Kolkhorst is chair of the Senate Health Services Committee

There are two physicians in the health services committee, Donna Campbell and Dawn Buckingham.

Women's Access to Care

[Refer to pages 3 – 5 of this document]

Medicaid Managed Care

Weekly check-ins with CHCC are happening. Nobody has many updates so far. Representative Davis continues to ward close to her chest about where she stands. She is about drafting legislation. I heard that Rep. Klick was interested in this issue as well. Sen. Watson is also interested in the piece around reforming fair hearings process. I think there is a fair amount of work to be done trying to make sure that the offices interested in this are hearing from folks who we know are hearing from health plans, like THA and TMA. Consumer advocates need to make sure we get those messages to them as well.

[Anne Dunkelberg, CPPP]

Were any of you able to participate in Chairman Raymond's meetings?

[Helen Kent Davis, TMA]

They did have a series of meetings that focused on long-term care side. I went to a few, there are some overlaps with long-term care from various stakeholders. It was helpful, although not everything was relevant. They also had a webinar on how to better engage stakeholders.

CHILDREN'S HEALTH COVERAGE COALITION
FORMERLY THE CHIP COALITION

[Anne Dunkelberg, CPPP]

I think we should follow up if they did anything on 12 month CE on these meetings.

[Helen Kent Davis, TMA]

There was a Medicaid Managed care summit. The purpose of the meeting was to bring together various stakeholders, to talk about the administrative issues that affect physicians, hospitals, and patient care, and efforts that we can work on together to improve children and women's health care. They do support 12 month coverage.

Most meetings revolve around issues like

- Modernizing Medicaid (red tape production),
    - How to make our organizations more transparent
    - Prior authorizations
    - Appropriate clinical input
    - Discharge planning becoming simpler
- Improvement processes of care
    - Care coordination
    - Making clear what is available.
    - Making sure physicians and patients understand who the service coordinator is and how to reach that person
    - Peer contracts
- A lot of interest on improving the Fair Hearings Process
    - HHSC is in the process of hiring additional staff to ensure that the fair hearing process improves. They are adding clinical staff since case work officers don't have clinical experience and they are making decisions that they may not fully understand.

We have a long list of things we are working on with the plans, some with legislation but there are some that don't need legislation. For example: SB 7 makes it clear on what we can do with telemedicine, but HHSC hasn't changed the policy for the codes that affect all telemedicine, components.

There is also interest in working on telehealth, telemonitoring. It's more about drilling down the most technical issues. There's a lot of talk on how to modernize Medicaid processes.

[Anne Dunkelberg, CPPP]

We still have medical policy in place where people with irreversible liver damage receive treatment after they've been affected instead of before to prevent such damage/illness.

Unless the state has a process to look holistically at drug costs, then it does look more expensive than it is. A better way at looking at costs.

Also, the Medicaid Managed Care Manual is never clear on what is covered and what is not.

## IV. Update on ACA ruling in Texas (Anne Dunkelberg, 15 minutes)

Big takeaways for us:

[Refer to Health Affairs Blog and CPPP Blog]

The documents are polar opposites of each other.

The status is that ACA is still in effect, and any action on the lawsuit is pending because of the government shutdown. Nothing can happen until 10 days after shutdown ends.

The House of Representatives has been asked to intervene, there's already a challenge from a progressive state (Cali).

Wisconsin asked to withdraw from the lawsuit because of the midterm elections results, but other states have also asked to be added.

It was noted that evidence shows that enrollment in the market place, although it has deteriorated a little bit, it is still stable. One of the judges who ruled in favor of Texas made a decision thinking that the enrollment wasn't stable, when in reality it is.

Nothing immediate will happen, it'll take about a year for anything to happen, so ACA is still the law of the land.

After that decision, Abbot made a statement that he would try to ensure that Texans with pre-existing conditions would be protected, and ensure that they can't be denied or charged more for services if they have pre-existing conditions.

In other words, people can't sell you a policy that doesn't cover your pre-existing condition.

Before those guarantees, if you were in the individual market, you had no protection against that. A full case repeal would be extremely damaging for Texans with pre-existing conditions. Those protections are in place, but some people are still left out of the coverage. It may be important to emphasize that uninsured people have no protections for their pre-existing conditions.

Steps that are highlighted [Refer to CPPP Blog)

- 23 states that have already placed limits on short-term plans. We hope that there might be some interest in Texas for transparency and to limit the plans to not make these plans cover more than 6 months
- 7 states have created a re-insurance pool/system where they use federal funding to help pick up the tab for people with the costliest health care plans. It takes the risks of the most expensive cases.
- Coverage gap creates a large population of low-income adults without access to health care and financial security, which is also something to keep in mind.

- Also, even with a slight loss of coverage, we still have a lot of people that bring up money to the state. $5 billion dollars are given every year for coverage. The repeal would be a billionaire loss to our economy and people losing coverage.

## V. Legislative Briefing (Laura Guerra-Cardus, 25 minutes)

We have a great line up of speakers, and I feel we are ready to go on the program, we are just waiting on PowerPoints.

We have about 25 people that have RSVPs so far, but in the past we've have between 75-100 attendees.

We need to make sure that we disseminate the invitation so please send it to your legislative office lists to invite them to come.

If you want you can print out the PDF/invitation and take it with you to your meetings with legislators.

Also, join us at 12 pm on Tuesday 1/22 at the Capitol Grill to drop off invitations (passing flyers)

Oliver at CPPP asked if we were open to have media in our briefing. Unless someone has an objection here, I will give him the green light to have media come into our briefing.

At the briefing, 1:30 pm – 2 pm will be networking and treats. If you can be there from 1-4 pm to help out with the set-up, that would be great.

[Meeting adjourned at 12:30 pm]

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https://www.healthaffairs.org/blog

# Appeal In Texas v. Azar Stayed Due To Government Shutdown

Katie Keith

**JANUARY 14, 2019**

Litigation continues in *Texas v. Azar*, a lawsuit over the constitutionality of the individual mandate and, with it, the entire Affordable Care Act (ACA). This post provides a brief update on the status of the case in the district court and the Fifth Circuit Court of Appeals, as well as some new positions taken by states in the lawsuit following the midterm elections. For now, the *Texas* litigation is on hold pending the end of the partial government shutdown, after which the case will proceed in the Fifth Circuit.

## Where Are We Now?

In mid-December, Judge Reed O'Connor declared the entire ACA to be invalid. He reaffirmed this decision in late December when issuing a stay and partial final judgment; this allowed the case to be appealed immediately to the Fifth Circuit. In the first week of January 2019, the Department of Justice (DOJ) and 17 Democratic attorneys general appealed *Texas* to the Fifth Circuit.

At the same time, the U.S. House of Representatives asked to intervene to defend the ACA in the proceedings at both the district court and the Fifth Circuit. The House gave itself the authority to intervene in *Texas* or any other litigation on the ACA through passage of a rules package. Then, on January 9, the House passed a separate, stand-alone resolution to allow the House to intervene in ACA-related cases. The vote was largely symbolic because the House had already authorized intervention but was designed to keep a focus on health care issues that helped drive the November midterm elections. All but three Republicans opposed the resolution, arguing it was unnecessary because the House had already asked to intervene in *Texas*. The resolution was approved by a vote of 235-192.

In response to the House's requests, the DOJ asked to stay the litigation in light of the partial government shutdown. This request is not unusual. To date, the DOJ has made similar requests in other cases, with mixed results. Judges have discretion in whether to grant these requests or not. A delay has been granted, for instance, in litigation over the Trump administration's rule on short-term plans but denied in the lawsuit brought by Maryland over the constitutionality of the ACA.

### Fifth Circuit

In the Fifth Circuit, the DOJ's response to the House's motion to intervene was due on January 17, 2019. Citing the shutdown, the DOJ asked that the Fifth Circuit delay this deadline until 10 days after the shutdown has ended. It also asked for briefing on the merits of the appeal to be stayed until after the DOJ is funded again. The intervenor states and the House opposed the delay; the plaintiffs took no position.

On January 11, the Fifth Circuit granted the DOJ's request. This means the appeal is on hold until the partial government shutdown has ended. The parties' response to the House's request to intervene will presumably be due 10 days after funds are appropriated to the DOJ.

## District Court

Although the case is likely to be decided in the proceedings at the Fifth Circuit, part of the lawsuit—over four of the five claims initially made by the plaintiffs—remains at the district court before Judge O'Connor. This part of the suit, however, has been stayed while the appeal over the first claim is on appeal to the Fifth Circuit.

Even so, the House asked to intervene so, if and when the case resumes in the district court, it can defend the ACA on the remaining four claims. The DOJ's response to the House's request would have been due on January 24. Again citing the shutdown, the DOJ asked for a stay. This request was opposed by the House.

On January 8, Judge O'Connor denied the DOJ's request. He specifically declined to lift the current stay in the lawsuit to rule on a motion to intervene on dormant claims. If and when the first claim returns from appeal or the stay is otherwise lifted, Judge O'Connor will set a briefing schedule on the House's motion to intervene.

## States Changing Their Positions

As the House tries to intervene in the lawsuit, some states are reconsidering their positions following the November elections. Some plaintiff states are trying to withdraw from the suit while others are trying to join the intervenor states to defend the ACA.

Officials in Maine and Wisconsin have both made moves to try to withdraw as plaintiffs. As discussed here, the attorney general's office in Maine stated that Governor LePage's representation of Maine in the lawsuit is unauthorized and that Maine is not represented in the case.

In Wisconsin, newly inaugurated Governor Tony Evers sent a letter to Attorney General Josh Kaul directing him to try to withdraw from the suit. This could be challenging given December 2018 legislation that gives the legislature oversight authority over changes to the state's legal position. An additional complication may be that the Wisconsin attorney general's office—still under then-Republican Brad Schimel—asked to withdraw from the district court case as counsel. According to the filing, Wisconsin "will continue to be

represented by other counsel of record from the Office of the Texas Attorney General," suggesting that Texas would represent the interests of Wisconsin. Judge O'Connor granted this request on December 30.

In addition to plaintiff states trying to withdraw, new state attorneys general are expected to try to join the intervenor states. New Democratic attorneys general in Colorado, Nevada, Michigan, and Wisconsin have already indicated their intent to do so as soon as possible.

# Latest Enrollment Numbers; Dem States, DOJ Appeal Texas To 5th Circuit

Katie Keith

## JANUARY 7, 2019

In a final open enrollment snapshot released on January 3, 2019, the Centers for Medicare and Medicaid Services (CMS) confirmed that enrollment in marketplace coverage through HealthCare.gov remained steady for 2019 at more than 8.4 million consumers. Despite a dip of about 43,000 consumers since the last snapshot, overall enrollment is down by only 4 percent relative to 2018. As discussed more here, the final data show the enduring stability of the marketplaces and continued demand for comprehensive individual market coverage.

This data is limited to enrollment in the 39 states that use HealthCare.gov, where the final enrollment deadline for 2019 coverage was December 15, 2018. It does not reflect enrollment in many state-based marketplaces, where some deadlines continue into January. CMS plans to release a more detailed final 2019 open enrollment report in March. Last year, a total of 11.8 million consumers in all 50 states and DC selected or were reenrolled in marketplace plans during the 2018 open enrollment period.

Stable enrollment cuts against one of the assumptions made by Judge Reed O'Connor in *Texas v. Azar, the litigation over the constitutionality of the individual mandate and, with it, the entire Affordable Care Act (ACA). In his December 14 decision declaring the entire ACA invalid, Judge O'Connor* asserted that upholding the ACA without the individual mandate penalty would change the "effect" of the ACA "as a whole." Among other ill effects, he suggested that insurers would face billions of dollars in ACA taxes without an expanded risk pool and there would be massive losses to hospitals because of uncompensated care. The data cited above confirms exactly the opposite: that enrollment remains steady and the marketplaces are stable for 2019, even in the absence of the penalty.

**New Developments In *Texas v. Azar***

2019 has brought continued action in *Texas v. Azar*, in court and in Congress. Over the past week, the intervenor states (led by California) and the Department of Justice (DOJ) appealed the case to the Fifth Circuit Court of Appeals. And, among its first actions, the new U.S. House of Representatives asked to intervene in the case to defend the ACA.

**Appeal To The Fifth Circuit**

On December 30, Judge O'Connor issued a stay and partial final judgment in the lawsuit. He did so at the request of the 17 Democratic attorneys general who had intervened in the case. This set the stage for the parties to immediately appeal his decision to the Fifth Circuit. On January 3, 2019, the intervenor states—led by California Attorney General Xavier Becerra—did just that, asking the Fifth Circuit to review Judge O'Connor's partial final judgment and underlying order.

The next day, the DOJ filed its notice of appeal. This should not be surprising. The Trump administration took the unusual position of agreeing with the plaintiffs that the mandate was unconstitutional and that key ACA protections for people with preexisting conditions should also fall. But DOJ also argued that the rest of the ACA was severable and should be upheld.

What comes next? We'll wait for the Fifth Circuit to issue a briefing schedule, which is the first step in the process. That will spell out the timeline for written arguments and then the case will likely be scheduled for oral argument. This entire process will take place over the next year or so.

**House Asks To Intervene**

In the meantime, the House filed the first of two motions to intervene in *Texas*. A request to intervene can be made when a nonparty is concerned that their interests or rights will not be fully represented by parties to litigation. A court can allow nonparties to intervene as a matter of right or at the court's discretion (known as permissive intervention) even over opposition from the parties. The motion was filed shortly after the House approved a rules package that authorized Speaker of the House Nancy Pelosi to intervene, otherwise appear, or take any other steps in *Texas* (or any other litigation on the ACA). (The House is expected to vote on a separate, stand-alone resolution on intervention in the lawsuit during the week of January 7.)

The House's first request is to intervene in the part of the lawsuit that remains in the district court before Judge O'Connor. Judge O'Connor's ruling on December 14 was only on the first of five claims made by the plaintiff states; the other four claims remain unresolved and before his court (even as his decision on the first claim is appealed). Two of these four claims are that the $0 mandate renders the ACA irrational. Without a rational basis for the law, the argument goes, the ACA violates the Due Process Clause and the Tenth Amendment. The remaining two claims ask the court to enjoin and prevent the federal government from enforcing or implementing the ACA.

The first claim is generally thought to be the "strongest" of the five, and the case is expected to live or die based on what the Fifth Circuit, and ultimately the Supreme Court, decide on the constitutionality of the mandate and severability. This likely makes the House's motion to intervene in the district court case largely symbolic (even though Judge O'Connor suggested that the plaintiffs could pursue at least some of their other claims). In any event, this part of the lawsuit is stayed until after the appeal on the first claim and will not be at issue until at least 2020.

The real action is now at the Fifth Circuit where the House filed its second motion to intervene on January 7. If granted, this would allow the House to defend the ACA and represent their interests alongside the intervenor states and, in part, the Trump administration.

The House asks to intervene as of right or, alternatively, for permissive intervention. The House is represented by Donald Verrilli, Jr. who served as Solicitor General under President Obama and successfully defended the ACA in cases like *National Federation of Independent Businesses v.*

*Sebelius* and *King v. Burwell*. He also argued *United States v. Windsor*, during which the Obama administration declined to defend the constitutionality of the Defense of Marriage Act (and in which the House intervened to defend the Act).

In arguing for intervention, the House points to 28 U.S.C. § 530D. Section 530D addresses the procedures to be followed when the Attorney General or DOJ decline to enforce or defend federal law based on the position that it is unconstitutional. In these instances, the Attorney General must submit a report to Congress that lays out his or her reasoning. Under Section 530D, that report must be submitted within a timeframe that allows the House and the Senate, separately or jointly, to intervene in the lawsuit in a timely fashion.

In declining to defend the constitutionality of the mandate, Attorney General Jeff Sessions invoked Section 530D and provided a report to Congress in letters to then-Speaker Paul Ryan and Minority Leader Nancy Pelosi in early June 2018. These letters outlined his reasoning for why the DOJ was taking the position that the $0 penalty rendered the individual mandate unconstitutional and that the ACA's other preexisting condition provisions should be considered inseverable from the mandate. According to the letter, the DOJ took this position "with the approval of" President Trump.

Given the DOJ's position, the House argues that Section 530D gives it the right to intervene in *Texas* to defend federal law. At a minimum, the House argues that Section 530D clearly shows its interest in intervening in the litigation.

The House further asserts that its interests are aligned with, but separate from, those of the intervenor states. These interests are distinct enough, the House argues, that it should be allowed to intervene in the case to defend those interests. First, the House, as a coequal branch of government, has an institutional interest in defending the laws it enacted and its ability to interpret the Constitution and pass laws based on that interpretation. Second, the House may make different arguments than the intervenor states.

One example is whether the plaintiffs have standing to sue, which the intervenor states did not discuss in their briefs (although it was raised during oral argument). The House suggests that the intervenor states might have different interests than the House on the standing of the plaintiff states. This is because challenging the standing of the plaintiff states may run counter to the intervenor states' long-term interest in arguing that states have standing to sue in other instances. The House raises a similar point of potential tension on the plaintiffs' Tenth Amendment claim as well.

Finally, the House argues that its motion is timely because it authorized intervention on the first day of the 116th Congress and does not prejudice the original parties to the lawsuit. The plaintiffs and Trump administration oppose the intervention while the intervenor states take no position.

January 16, 2019

# On One (Pre-Existing) Condition

By Stacey Pogue


Pre-existing medical conditions — like high blood pressure, diabetes, and asthma — are common. Most of us either have a pre-existing condition or live with someone who does. The health care system needs to work for everyone, including people who aren't in perfect health.

There's been lots of recent talk about protecting people with pre-existing medical conditions. Many candidates pledged support for coverage of pre-existing conditions during the November 2018 elections. Since then, Texas Governor Greg Abbott has said that Texas will strive to "ensure that Texans with pre-existing conditions are protected." These assurances reflect the strong public support for the topic – 3 in 4 Americans say that it is "very important" to maintain Affordable Care Act protections ensuring the people with pre-existing conditions can't be denied coverage or charged more, per the Kaiser Family Foundation.

Much of the attention on pre-existing conditions has been in response to the lawsuit that Texas Attorney General Ken Paxton is leading, seeking to end the Affordable Care Act. The first court to rule on the case sided with the Texas AG, but the case is sure to be tied up in court for months or years, and for now, the Affordable Care Act remains the law of the land.

## What does it mean to protect people with pre-existing conditions?

People who already know they'll need ongoing health care, need the following assurances about coverage:

1. Health insurance companies can't turn you down or charge you more due to your health status;
2. Insurance policies can't exclude coverage for pre-existing conditions; and
3. Policies have comprehensive coverage. A person with asthma needs inhalers covered and someone with cancer needs oncology benefits. Having an insurance card in your wallet is only meaningful if it covers the health care you will need.

If you buy insurance on your own (as opposed to receiving coverage through a job), you didn't have any of these guarantees before the Affordable Care Act. Repeal of the Affordable Care Act would sweep away those protections along with other protections Americans have come to rely on.

**What can Texas do today to protect people with pre-existing conditions?**

The Affordable Care Act is still the law of the land, and its protections remain in place. However, affordability of coverage is a challenge, especially for two groups of people in Texas: (1) people who make too much to qualify for Health Insurance Marketplace subsidies (more than $83,000/year for a family of three) and (2) low-wage adults in the "Coverage Gap" who earn too little for Marketplace subsidies, but do not qualify for Medicaid.

**Regardless of the eventual outcome of the lawsuit, there are three actions Texas can and should take today to lower the costs of health insurance for people with pre-existing conditions.**

**1. Texas should place reasonable limits on "short-term" plans, as 23 states already have.** These skimpy plans were initially designed to fill short gaps between other coverage, but they can now be offered as year-round coverage with policies that last as long as 3 years (making "short-term" a misnomer).

**These plans violate all three provisions above.** They can deny coverage to people in less-than-perfect health and contain broad exclusions of any health care for a pre-existing condition. These plans often lack coverage for prescription drugs, mental health care, preventive care, and other necessary health care. In other words, short-term plans don't compete with regular health insurance on an even playing field. They play by vastly different rules.

As short-term plans cherry-pick the healthiest people, the pool of people covered in traditional insurance—the only type available to people with pre-existing conditions — becomes sicker on average, causing premiums to rise and insurers to flee. In this way, even though a person with a pre-existing condition is unlikely to be able to buy a short-term plan, they are still harmed by them.

**Texas policymakers cannot truly claim progress on pre-existing conditions protections while allowing short-term plans to proliferate and drive up costs of coverage for people with pre-existing conditions.** Texas should strike a balance. It should ensure short-term plans are available to fill temporary gaps in coverage of three or six months, as several other states have, while mitigating big premium hikes for people in less-than-perfect health.

**2. Texas should apply for a "1332 waiver" to collect federal funding that will help lower the price tag for good coverage that includes pre-existing condition protections.** Seven states, including Alaska, Wisconsin, and Maine, have already taken this step, and they expect premiums for comprehensive coverage to drop as much as 30 percent for people who don't have access to job-based insurance and buy coverage on their own. These states have set a "reinsurance system" that uses federal funding to help pick up the tab for people with the costliest health care, allowing insurers to reduce premiums.

Texas should only pursue a 1332 waiver that brings down premiums for and boosts enrollment in traditional health insurance that has good coverage and cannot deny coverage or charge more to people with pre-existing conditions.

**3. Close the Coverage Gap**. Texas still has to deal with the fact that we are currently leaving low-wage Texans in the Coverage Gap because state leaders keep turning down Medicaid expansion funding. Extending coverage to low-wage Texans would improve their access to health care and financial security, and as an added bonus, Medicaid has strong pre-existing condition protections.

**But what if the courts eventually strike down the entire Affordable Care Act?**

**If the courts eventually strike down the Affordable Care Act, narrowly-focused state action to replace pre-existing conditions protections would be a wholly inadequate response.** Nearly 1.1 million Texans just enrolled in Marketplace coverage for 2019. In 2018, 9 in 10 Texas Marketplace enrollees got a premium subsidy to lower their costs – which amounts to a nearly $5 billion-a-year investment in connecting Texans to coverage. Without this federal funding, most enrollees would be unable to afford coverage regardless of whether pre-existing condition protections are in place or not.