

# Affordable Care Act Litigation – May 2020 Updates

The coronavirus pandemic has highlighted the urgent need for healthcare coverage for all Americans, once again putting the Affordable Care Act (ACA) in the national spotlight. The law, however, has long been immersed in various types of litigation, involving both state governments and private insurers, a few of which have reached the Supreme Court after many years in the making. This month, we take a look at the latest Supreme Court action in two recent lawsuits involving the ever-controversial law and its legacy.

## **Insurers Win \$12 Billion Lawsuit for ACA Risk-Corridor Payments**

In April, the Supreme Court issued an 8-1 ruling[\[1\]](#) that would require the federal government to honor its obligation and pay \$12 billion in funds owed to insurers under the ACA risk corridor program. The ACA's temporary risk corridor program, implemented from 2014 to 2016, was created to encourage insurers to participate in the health insurance marketplaces in the early years. To incentivize insurance companies to offer affordable premiums to people with preexisting conditions and those who otherwise would have been denied coverage, the government promised to provide subsidies and reimburse participating insurers that had excessive costs and losses. Specifically, using a formula under Section 1342 of the ACA mandates, the Department of Health and Human Services (HHS) would claim excess savings from the profitable health plans and redistribute these funds in payments to the nonprofitable plans.

In practice, HHS collected savings from the profitable

insurers as intended under the program. However, the funds collected were far less than the subsidies needed to reimburse the unprofitable insurers, creating a deficit that the government failed to pay. Claiming more than \$12 billion in unpaid funds, health insurers filed suit in the Court of Federal Claims to recover the payments owed under the program. The government argued that Congress intended to repeal or suspend the risk corridor payments when it passed appropriation riders in 2015 and 2016 which limited the funds from which HHS could pay insurers. They reasoned that because Congress did not appropriate alternative funds to pay the risk corridor payments beyond what was collected in the savings fund, it effectively released the government from the payment obligation.

The Court of Appeals for the Federal Circuit ruled for the government in June 2018, holding that the risk corridor was an incentive program that did not impose an obligation, because the government did not provide budgetary authority to HHS to administer the payments. The [question presented](#) before the Supreme Court, in three consolidated cases brought by four insurers, [\[2\]](#) was whether Congress can use its appropriation power to amend or repeal a statutory obligation and apply such changes retroactively.

The Supreme Court answered in the negative and reversed the lower courts. In an [8-1 decision](#), the justices held that the language “shall pay” in the ACA provision created a legal duty for the federal government to pay regardless of appropriations. Additionally, any appropriation riders passed by Congress did not repeal that obligation, because the mere omission of an appropriation does not sufficiently imply intent to cancel the obligation. In the majority opinion, Justice Sonia Sotomayor said the decision reflects “a principle as old as the nation itself: The government should honor its obligations.” Justice Stephen Breyer concurred that the government should pay its contracts, just like anybody

else.

While this a big win for insurers, [health policy experts](#) indicate these retroactive payments will not matter much because the failure to collect government payments back then had forced many of the insurers to go out of business. Not only will they be unable to collect these retroactive payments, their exit from the marketplace had reduced competition and in turn contributed to premium increases in the ensuing years. Such damage cannot be remedied after the years of litigation it took to reach the Supreme Court. Nonetheless, the decision upholds the integrity of the ACA and affirmatively honors an ACA obligation despite the heavy price tag. This ruling may indicate the high court's willingness to rule similarly in other cases that seek to weaken the ACA.

### **Democratic States and Lawmakers Argue ACA Indispensable During COVID-19 in Opening Briefs to Supreme Court**

In a separate case involving the ACA that will be a far bigger test of the law with far greater implications, the Supreme Court is set to review the validity of the law itself. In March, the high court granted certiorari of the 5<sup>th</sup> Circuit's decision in Texas v. United States, in which Republican states led by Texas sought to overturn the entire law. In response, California led several Democratic states to defend the law in California v. Texas. The [questions presented](#) before the court, in the two consolidated cases, are whether the elimination of the tax penalty renders the individual mandate provision unconstitutional, and if so, whether the entire law should be struck down or is severable and stands alone on its own.

This month, California Attorney General Xavier Becerra, along with 20 Democratic attorneys generals, filed an [opening brief](#) stating that the ACA's mandates "have proven indispensable in the context of the current pandemic." According to a new

Kaiser Family Foundation (KFF) [report](#), nearly 27 million Americans have lost employer-sponsored insurance as a result of losing their jobs in the COVID-19 crisis. The brief pointed out, as confirmed by the KFF study, that the ACA helped many people maintain affordable health coverage through subsidies and other mandates under the law.[\[3\]](#) The [House of Representatives](#) echoed the argument in its own opening brief, writing that the pandemic makes it “impossible to deny that broad access to affordable health care is not just a life-or-death matter for millions of Americans, but an indispensable precondition to the social intercourse on which our security, welfare and liberty ultimately depend.” Following the Petitioner’s opening brief, [several more state attorneys general](#), including Maryland, Pennsylvania, and Maine, [members of the Senate](#), and a slew of [provider and payer groups](#) filed amicus briefs in support of the seminal law. They further emphasized that invalidating the law, which had significantly expanded access and coverage, would strain the healthcare system, particularly in the middle of a devastating pandemic. Respondents led by Texas have a deadline of June 25 to file their opening briefs, and amicus briefs in support of Respondents are due for filing by July 2.

No stranger to attempts to bring down the law, all eyes are on the Supreme Court, especially as the COVID-19 pandemic significantly changes not just the healthcare but also economic landscape. This further raises the stakes of the lawsuit for all Americans, which could potentially change the trajectory of the litigation. Oral arguments in the case may take place as soon as October, when the Supreme Court’s fall term begins, while a decision may not be handed down until end of the spring term in June 2021. Stay tuned for more developments and latest actions.

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[\[1\]](#) Maine Community Health Options v. United States, U.S., No. 18-1023, 4/27/20.

[\[2\]](#) The lead case for Supreme Court review is Maine Community Health Options v. United States, U.S., No. 18-1023, 4/27/20. The four insurers in the consolidated cases are Maine Community Health Options, Blue Cross and Blue Shield of North Carolina, Land of Lincoln Health, and Moda Health Plan.

[\[3\]](#) Kaiser Family Foundation estimates that more than 20 million people losing job-based health coverage will become eligible for ACA coverage through Medicaid or marketplace tax credits. See

<https://www.kff.org/coronavirus-covid-19/issue-brief/eligibility-for-aca-health-coverage-following-job-loss/>.