

Todd Askew discusses the Supreme Court's decision on the ACA

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In today's episode of Moving Medicine, a discussion with Todd Askew, the AMA's senior vice president of advocacy in Washington, D.C., about the Supreme Court's recent decision on the Affordable Care Act and what it means for the future of health care.

Speaker

- Todd Askew, senior vice president, advocacy, AMA

Transcript

Unger: Hello, this is the American Medical Association's Moving Medicine video and podcast. Today I'm joined by Todd Askew, the AMA senior vice president of advocacy in Washington, D.C., to discuss the Supreme Court's recent decision on the Affordable Care Act and what it means for the future of health care. I'm Todd Unger, AMA's chief experience officer in Chicago. Todd, this is just going to be two Todds talking about the Affordable Care Act. Not the first time this challenge has come before the Supreme Court. Can you give us a little bit of an overview of the question this time?

Askew: Sure, Todd. So you recall back in 2012, the court ruled that the individual mandate component of the ACA was constitutional because the penalty it imposed was really an exercise of Congress' taxation power. But in 2017, Congress took that amount of penalty and they made it zero. So they effectively eliminated it from the law. So the plaintiff's filing this case argued that since the penalty was now eliminated, the mandate was no longer an exercise of that taxation power. And therefore, the mandate was now unconstitutional. And they went on to argue that since this was such a key component of the ACA that the whole rest of the law needed to fall as well because the

mandate was such an intricate part of how the overall law operated. So they argued it's not that it was not severable from the rest of the law, that the whole thing must fall.

And so the court was really faced with several questions to deal with. The first was, did these plaintiffs actually suffer concrete harm that was traceable to the ACA and they could be remedied or addressed by the court? So do they have standing to even be in front of the court on this issue? And beyond that, there were several other questions that remain. Was the mandate constitutional? If it was unconstitutional, then can the rest of the law stand? And if the rest of the law can't stand, how much of the law fails? Does it just the part directly related to the mandate, like guaranteed issue or community rating? Or other bigger parts of the law not related to the mandate, like the subsidies related to the Medicaid expansion or the subsidies to buy health insurance or even everything else that was in the law?

So they had all these questions that they needed to address, but at the end of the day, the court by seven to two margin ruled that the plaintiffs didn't have standing to be in front of the court at all. It was Justice Breyer and Chief Justice Roberts riding for the majority and they said that without a penalty, that the government no longer has a means to enforce the mandate. And since there was no way for the government to enforce the mandate, there's no way to link that mandate to any harm that could have been suffered by the individuals. And they found a similar finding for the state plaintiffs as well. So at the end of the day, they never really got to the other questions. They just said that the folks bringing in the case in front of the court had not been harmed by anything related to the ACA and so couldn't actually be there.

Unger: So given that, that was kind of a ruling based on standing and you outlined just a number of other questions that were involved there. Does it leave the ACA open to similar challenges in the future?

Askew: Sure. So, first of all, let me mention real quickly kind of what could have happened, if I could. And if we can really only speculate, like what might happen in the future, if they find another way to get to this. If the mandate had been ruled unconstitutional, that could've just been it, right? Nope, no more mandate. But the rest of the law continues to operate because we've effectively been operating without a mandate for five years and coverages as high as it has been in ACA at any time. They could have said that the community rating piece is guaranteed issue?—preexisting conditions—that all goes away and that would have just destroyed the markets. Skyrocketing insurance rates, preexisting condition exclusions would've come back, you would have had that downward spiral where healthier people drop out because coverage is too expensive.

Rates go up further more people drop out, and so you end up with only the very sickest and the very highest rates. And they could have eliminated, like we said, all the coverage that's been gained under Medicaid, all the subsidies that have gone to help people purchase health insurance. But we'll never really know, hopefully, we'll never really know, what the court would have said about those questions

of constitutionality or severability. But we could face similar challenges in the future. The court set a really high bar when they said that the plaintiffs had to have suffered directly from a mandate that was not enforceable. That's pretty high standard because if you can't enforce it, you can't harm the plaintiffs. But in the dissent that was written by Justices Alito and Gorsuch, there was a discussion of something called standing through inseverability. And basically what that means is for the states that sued, they have had all these other burdens and costs imposed upon them by the ACA.

And the theory goes, if the mandate was unconstitutional and also not separable from the rest of the law, then you can link the harm the state has had back to the mandate and potentially the whole thing could fall. Now, the court didn't directly consider that because it was never raised in the lower courts and it was never put forward by the plaintiffs but you could kind of see a pathway where they could potentially a state could bring another lawsuit. You know, when we first got into this lawsuit and the previous one, a lot of it was just political theater. And I think a lot of the benefits that people thought they would gain from attacking the ACA have kind of played out but there are obviously still some states and some folks who this still plays very well. And so you could still see a case come back in the future based on the state's potential harm. But like I said, it's a pretty high bar.

Unger: And the AMA has been a supporter of the ACA for some time just for some of the things that you outlined and if it were to go away, the ranks of the uninsured could grow dramatically. And there are a lot of popular pieces of this in terms of coverage for young adults and some of the discounts that you mentioned. Can you talk about the thinking behind the AMA stance and what we have done on behalf of physicians to support our position there?

Askew: Sure. The AMA has for a very long time been very strong in believing, and today, we need to ensure that all Americans have access to quality, affordable health insurance. There's a standing priority for the AMA. While at the same time, preserving kind of the pluralistic nature of our health care system, that preserves choice for our patients but also for physicians and other non-physician health care providers as well and how they participate in the health care system. So at its heart, of course, the ACA is really just private health insurance kind of delivered through a well-regulated market with subsidies provided for people who can't afford to purchase health care coverage without help. And this whole idea of providing subsidies inversely related to income for the purchase of private coverage is really central to AMA policy existing before the ACA was ever proposed.

While no plan is really perfect, on a whole the ACA is very consistent with, I think, both the letter and the intent of AMA policy. It's been reaffirmed a couple of times by the House of Delegates. And though it's not perfect, it really is preferable and much more in-line with AMA policy than a lot of other options that were on the table at the time the ACA was proposed and that are even on the table today. So we continue to work to address the problems in the ACA, to improve it, to make coverage more affordable and accessible. So kind of focusing on keeping what works and continuing to work and improve and fix what doesn't work.

Unger: When you mentioned improvements, can you give some additional detail on what that might look like?

Askew: Sure. Yeah. So there are lots of gaps in the ACA. And so that means lots of opportunities to make changes. One thing that's just very basic is there are millions of people who could sign up for free or very, very low cost coverage today who are eligible, who are just not enrolled. Millions. So we need to go out and find those folks, whether they be Medicaid eligible or eligible for subsidized coverage under the ACA through the exchanges and get those folks enrolled. That's a very large chunk of people.

Unger: Is that a marketing thing, Todd?

Askew: It's putting the resources in and is convincing people of the value of health insurance, especially younger people. And we can provide more incentives to encourage kind of those invincible young folks that never think they're ever going to have a sick day in their life to get them insured because a lot of people are surprised. They hear, "but these premiums are thousands of dollars," but they're not. When the subsidies are applied, it's hundreds or less, much less. And there's also even some folks that would not pay any premiums or cost sharing at all. So, we really got to convince them that this is worthwhile effort for them to get enrolled. You also have a group of people who are just kind of outside what's really affordable. They're people above 400% of poverty who don't qualify for any subsidization.

So we can increase the generosity of the tax credits. We can increase access to these cost sharing reductions that reduce folks' cost sharing once they are covered. We can eliminate the cap, that 400% cap. Some of these things were done recently by Congress on a temporary basis as part of the American Rescue Plan Act and we're looking for opportunities to extend those type of things further. Other things we could fix to increase coverage, there's a threshold that determines if you're eligible for the ACA based on the affordability of the premiums your employer may offer you. And you can tweak that a little bit to make more people eligible based on the affordability of what's offered to them. You also have this group of folks who, while they may have individual coverage from their employer that's affordable, if they wanted to take advantage of their employers' family coverage, it may be way out of their reach. It may just be very, very expensive.

But the ACA, through a drafting issue really, didn't take into that factor in their affordability test. So when the individual has access to affordable coverage, none of their family members are eligible for the ACA, even if they can't afford coverage for their family. And so we call that the family glitch and that's something that Congress and maybe even the administration could fix to make a whole group of individuals. So there are lots of things we could do to kind of get as closer to that ultimate goal of having almost everybody in the country have access to really quality, affordable health insurance coverage.

Unger: Well, last question, having survived this kind of third challenge, how does the most recent decision affect or what does that mean for the long-term stability of the ACA?

Askew: Sure. So I think that had the ACA fallen, it would have been the Wild West. If the whole thing basically hadn't been eliminated or had been severely harmed, I think you would have seen a big push in Congress to do something like single payer. And while there would have been a big debate and a lot of back and forth, ultimately we don't believe that anything like that has the votes to get through Congress. So at the end of the day, you would have had a lot of conversation and you would still have tens of millions, potentially, of people having lost their health insurance and having no access to anything else. So what we've seen now is the Biden administration, and President Biden was pretty consistent about this during the campaign, building on what works. We've seen the administration now come forward through the American Rescue Plan Act but also in their proposals going forward to build on the ACA, to strengthen those protections, to add additional access to subsidies, for example, for people who may not quite be able to afford coverage.

And that really seems, to me, and to us, I think, a more achievable goal. It's a goal that ... It's not going to be overnight that everybody has coverage but it makes coverage accessible for everybody. And I think that what we want to see is results. We want to see people get coverage, not just based on what our preferred solution may be. The most important thing is that we continue to build on that. So, if that's where the focus remains, fixing the problems and building on what works, I think that there's a pretty good stable future for the Affordable Care Act.

Unger: Sounds like a plan. Todd, thank you so much for your perspective and being here today. That's it for today's Moving Medicine video and podcast. We'll be back with another segment soon. You can join us for future episodes and podcasts of Moving Medicine by subscribing at ama-assn.org/podcasts. Thanks for joining us, please take care.

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