

## **BRIEF19**

*A daily review of covid-19 research and policy.*

### **POLICY BRIEFING**

#### **Supreme Court signals that it may uphold Affordable Care Act.**

Amid rising coronavirus cases and hospitalizations, the Trump Administration argued on Tuesday, November 10<sup>th</sup> that the entirety of the Affordable Care Act (ACA), including its protections for the millions living with preexisting conditions, should be struck down as unconstitutional. This is particularly problematic now as the United States crosses 10 million coronavirus cases, such that many Americans have acquired preexisting conditions as a result of a poorly-controlled pandemic, and which could constitute grounds for insurance denial in the absence of the ACA's protections.

Stripping insurance from tens of millions of Americans during a deadly pandemic poses the additional challenge: even among those thus far not contracting coronavirus, many have had [greater mental health needs](#) amid the pandemic. Coverage for such services currently falls under the essential health benefits of the ACA.

How did the oral arguments unfold? Fortunately, the Supreme Court justices did not appear show much interest in being receptive to the arguments for its invalidation made by lawyers for the Trump Administration. The case heard yesterday arose because the 2017 Tax Cuts and Jobs Act zeroed out the penalty for individuals who failed to enroll in health insurance. (The individual mandate component of the ACA was previously [upheld](#) by the Supreme Court based on Congress's power to tax). This new lawsuit, *California v. Texas*, hinges on two substantive questions: 1) Since the mandate penalty was upheld based on Congress's power to tax, is the a penalty-free mandate unconstitutional? And 2) If the current mandate is unconstitutional, can it be severed from the rest of the ACA, or must the entire law be struck down as unconstitutional?

During the arguments yesterday, Chief Justice John Roberts asked why there was a “bait and switch” from viewing the mandate as essential to the ACA to viewing the ACA as functional with the zeroed-out penalty. To this, Donald Verrilli, a lawyer working on behalf of Democrats in the House of Representatives responded that they had learned that the law seems to work anyway: “It turns out that carrots work without the stick.” Justice Sonia Sotomayor commented that if Congress wanted the entirety of the Affordable Care Act to be struck down, they would have voted to do so but they did not, suggesting that Congress felt that the ACA could continue to exist even without the penalty in place. It was for these reasons that Justice Brett Kavanaugh commented that the case appears straightforward with respect to severability: that is, that the Court presumes that any portion of a law found to be unconstitutional is severable from the rest of the Act, rather than necessitating that the entire Act be struck down as invalid. Moreover, Chief Justice Roberts appealed to notions of judicial restraint, commenting that striking down the Affordable Care Act when Congress would not is “not our job.”

While it is altogether possible that the mandate will be struck down as unconstitutional, it is likely from the oral arguments yesterday that the rest of the ACA will remain intact for the long run under a Biden administration. *Abbreviated from Brief19 for [11 November 2020](#).* —Miranda Yaver, PhD

**A third wave of coronavirus infections at the White House.** Overshadowed by the nation's attention on the Biden-Harris victory came the stunning, albeit not surprising news from the White House—Chief of Staff Mark Meadows and six administration officials around him have tested positive for covid-19. The new outbreak [swelled](#) to eight positive cases—six more in the White House and one connected to the Trump campaign.

This is the third “wave” of coronavirus infections to hit the White House. In the beginning of October, the world learned that President Trump and Melania Trump had tested positive for covid-19, in addition to a handful of other administration and military officials. Immediately following the outbreak, my colleagues

**COVID-19 at the White House – Round 3**

Name	Position	Category	Result	Severity	Contact of	Quarantine Status	Last Result Date
Mark Meadows	Chief of Staff	Administration	Positive				November 4, 2020
Nick Trainer	Campaign aide	Other	Positive				November 6, 2020
Cassidy Hutchinson	White House aide	Other	Positive				November 6, 2020
Charlton Boyd	White House aide	Other	Positive				November 6, 2020
White House aide 3	White House aide	Other	Positive				November 6, 2020
White House aide 4	White House aide	Other	Positive				November 6, 2020
White House aide 5	White House aide	Other	Positive				November 6, 2020
Ben Carson	Secretary of Housing and Urban Development	Administration	Positive				November 9, 2020

Table: Benji Renton • Source: Multiple sources • Created with Datawrapper

Peter Walker, Dr. Jesse O’Shea and I joined to create a public dashboard tracking the outbreak through public reports of individuals connected to the White House. Our [latest version](#) of the first round of infections included 385 total individuals involved and 40 positive cases, many of which can be traced back to the Rose Garden event on September 26 announcing Amy Coney Barrett’s nomination to the US Supreme Court. A [second round](#) of infections occurred in late October centering around Vice President Pence’s chief of staff Marc Short and four other individuals connected to the vice president. Meadows, who tested positive on Wednesday, initially [told others](#) not

to disclose his diagnosis. Meadows attended two major events on Tuesday (Election Day), presumably while infectious—an event at campaign headquarters and an election night party at the White House on Tuesday night. Our tracking team has launched a new [dashboard](#) and is in the process of identifying individuals present at these events. Currently, in addition to Meadows, the other individuals who have tested positive include Nick Trainer (a campaign aide), as well as Cassidy Hutchinson, Charlton Boyd and three White House aides. On Monday, another case was [reported](#), this time in Housing and Urban Development Secretary Dr. Ben Carson, who attended the election night party at the White House. Meadows has rarely worn a mask in public and has repeatedly fought with science and public health advisers. “We’re not going to control the pandemic,” he told [CNN](#) on October 26. “We are going to control the fact that we get vaccines and therapeutics.” [10 November 2020](#). —Benji Renton, <http://www.whcovidtrack.com>

**A return to record-breaking days.** Amidst record-breaking voter turnout, the coronavirus pandemic has continued to set records of its own. Friday [saw](#) a third straight day of all-time highs, at 132,700, as well as more than 1,000 deaths for the fourth day in a row. 27 states have set weekly case records, and 17 states set one day case totals. Globally new daily cases have surpassed 605,000 for the first time, and countries are reinstating various lockdown measures. There is some good news, however. The increased enforcement and practice of social distancing seems to have [lowered](#) the prevalence of influenza cases as the Northern hemisphere moves into the winter season. *Various*. [9 November 2020](#). —Joshua Lesko, MD

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*Brief19* is a daily executive summary of covid-19-related medical research, news, and public policy. It was founded and created by frontline emergency medicine physicians with expertise in medical research critique, health policy, and public policy.