

BUY INSURANCE OR ELSE?: RESURRECTING THE INDIVIDUAL MANDATE AT THE STATE LEVEL

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INTRODUCTION

The Affordable Care Act (ACA) has been subject to considerable volatility, with perhaps the greatest blow being the rescission, as part of the 2017 Tax Cuts and Jobs Act, of the penalty for its individual mandate to have health insurance coverage.¹

As a *New Republic* article noted, “we will now find out whether or not an individual mandate really is essential to health reform. And that will settle an old intra-Democratic fight that has been dormant for a decade.”² The author, Joel Dodge, noted that in the face of Republican efforts to repeal the ACA, “Obamacare defenders (myself included) rebutted these attacks by doubling down on the argument that the law’s entire structure would collapse without a mandate.”³

Yet, following the mandate’s repeal, Dodge admitted:

The mandate was also never much of a mandate to begin with.
The Obama administration gave numerous exemptions from

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¹ Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017). The individual mandate requires that “[a]n applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.” 26 U.S.C § 5000A(a) (2018). Confusing to the average person might be the fact that *this mandate still exists*—it was only the penalty for violating it that was zeroed out. See Tax Cuts and Jobs Act, § 11081(a); see also Jennifer Haberkorn et al., *Hatch Adds Repeal of Obamacare Mandate to Tax Bill*, POLITICO (Nov. 14, 2017), <https://www.politico.com/story/2017/11/14/senate-gop-obamacare-mandate-repeal-to-tax-bill-244891> (“Because of arcane Senate rules, Republicans cannot technically repeal the mandate. Instead, they would change the fines to \$0, which would have the same effect as repeal.”). As this effectively made the mandate a nullity, this article refers to the mandate as having been repealed.

² Joel Dodge, *Can Obamacare Survive Without the Individual Mandate?*, THE NEW REPUBLIC (Jan. 3, 2018), <https://newrepublic.com/article/146462/can-obamacare-survive-without-individual-mandate>.

³ *Id.*

the mandate for hardship and other life circumstances. And at just \$695 or 2.5 percent of *household* income, the mandate's penalty for going without insurance costs far less than the cost of actually buying insurance.⁴

In contrast, in Massachusetts, the state that pioneered health care reform, the penalty for going uninsured, when one is deemed to be able to afford coverage, is "50 per cent of the minimum insurance premium for creditable coverage available through the commonwealth health insurance connector for which the individual would have qualified during the previous year."⁵

As one national policy magazine noted, after the individual mandate was repealed, many Democratic legislators expressed support for enacting it in their states, but those efforts mostly faltered: "Health policy experts attribute the waning enthusiasm to the unpopularity of the individual mandate."⁶

This article traces the origin of the individual mandate, chronicles the efforts of some states to enact their own mandates, and concludes by questioning whether the mandate is either necessary or politic.

I. THE INDIVIDUAL MANDATE

Although his name is likely unknown by most today, Stuart Butler of the conservative Heritage Foundation can be viewed as the father of the individual mandate concept.⁷ In a 1989 essay, Butler, then the director of domestic policy studies for Heritage, laid out Heritage's plan.⁸ He noted:

[W]e in the U.S. are very reluctant to require households to protect themselves against health care needs. Thus we find many individuals and families, particularly among the young, who decide to use their income for other objectives than health care insurance, even though they have the means to obtain

⁴ *Id.* (emphasis added).

⁵ MASS. GEN. LAWS ch. 111M, § 2 (2008).

⁶ Mattie Quinn, *State Efforts to Bring Back Obamacare's Individual Mandate Stall*, GOVERNING (Mar. 5, 2018), <http://www.governing.com/topics/health-human-services/gov-obamacare-individual-mandate-tax-law-states.html>.

⁷ See Conor Friedersdorf, *Did a Conservative Think Tank Really Invent the Individual Mandate?*, THE ATLANTIC (Oct. 21, 2011), <https://www.theatlantic.com/politics/archive/2011/10/did-a-conservative-think-tank-really-invent-the-individual-mandate/247124/>.

⁸ See STUART M. BUTLER, THE HERITAGE LECTURES: ASSURING AFFORDABLE HEALTH CARE FOR ALL AMERICANS 1 (1989).

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insurance without cutting back on other necessities. Often these are individuals who are healthy. They are playing Russian roulette with their continued good health.⁹

Heritage then felt that “[a]ll citizens should be guaranteed universal access to affordable health care.”¹⁰ Toward that end, Heritage had a radical prescription:

Many states now require passengers in automobiles to wear seatbelts for their own protection. Many others require anybody driving a car to have liability insurance. But neither the federal government nor any state require all households to protect themselves from the potentially catastrophic costs of a serious accident or illness. Under the Heritage plan, there would be such a requirement.¹¹

Butler relied upon a colorful analogy in making his case:

If a young man wrecks his Porsche and has not had the foresight to obtain insurance, we may commiserate but society feels no obligation to repair his car. But health care is different. If a man is struck down by a heart attack in the street, Americans will care for him whether or not he has insurance. If we find that he has spent his money on other things rather than insurance, we may be angry but we will not deny him services—even if that means prudent citizens end up paying the tab.¹²

As Butler stated, “[a] mandate on individuals recognizes this implicit contract.”¹³

The mandate was an integral part of then-Governor Mitt Romney’s Massachusetts health care reform in 2006, and its Heritage Foundation antecedents were not completely forgotten in Republican circles.¹⁴ In September 2013 the ACA-opposing *Wall Street Journal* editorialized that it did not “need any lectures about principle from

⁹ *Id.* at 2.

¹⁰ *Id.* at 3.

¹¹ *Id.* at 6.

¹² *Id.*

¹³ *Id.*

¹⁴ See Martha Bebinger, *Personal Responsibility: How Mitt Romney Embraced the Individual Mandate in Massachusetts Health Reform*, 31 HEALTH AFF. 2105, 2106, 2110 (2012).

the Heritage Foundation that promoted RomneyCare and the individual mandate that is part of ObamaCare. Or from cable TV pundits who sold Republicans on Mitt Romney despite RomneyCare.”¹⁵

Former House Speaker Newt Gingrich, an avid supporter of President Trump,¹⁶ has tried to explain away “his past support of a mandate as an antidote to the health care overhaul proposed by Hillary Rodham Clinton during her husband’s administration.”¹⁷ And it is true that “[t]o combat President Clinton’s proposal, a large group of Republican senators, including the minority leader at the time, Bob Dole . . . proposed a bill that would have required individuals, and not employers, to buy insurance.”¹⁸ However, Gingrich *still* embraced the individual mandate six years after Clinton left office, in April 2006, as the *Washington Post* reported:

“The most exciting development of the past few weeks is what has been happening up in Massachusetts,” wrote Gingrich, or someone speaking for Gingrich, in his “Newt Notes” newsletter. “The health bill that Governor Romney signed into law this month has tremendous potential to effect major change in the American health system. We agree entirely with Governor Romney and Massachusetts legislators that our goal should be 100% insurance coverage for all Americans. . . . Individuals who can afford to purchase health insurance and simply choose not to place an unnecessary burden on a system that is on the verge of collapse; these free-riders undermine the entire health system by placing the onus of responsibility on taxpayers.”¹⁹

¹⁵ *The Cruz Campaign Against ObamaCare*, WALL STREET J. (Sept. 23, 2013), <https://www.wsj.com/articles/the-cruz-campaign-against-obamacare-1379978812>.

¹⁶ See, e.g., Newt Gingrich, *Trump (and His Success) Continues to Baffle Our Country’s Elites. What’s Going On?*, FOX NEWS (Mar. 16, 2018), <https://www.foxnews.com/opinion/newt-gingrich-trump-and-his-success-continues-to-baffle-our-countrys-elites-whats-going-on> (“[T]he media and Washington establishment still don’t understand our nation’s 45th president. They continue to criticize, distort, discredit and ignore his actions and accomplishments—while making little to no effort to actually understand what he’s doing and the way he operates.”).

¹⁷ Michael Cooper, *Conservatives Sowed Idea of Health Care Mandate, Only to Spurn It Later*, N.Y. TIMES (Feb. 14, 2012), <https://www.nytimes.com/2012/02/15/health/policy/health-care-mandate-was-first-backed-by-conservatives.html>.

¹⁸ *Id.*

¹⁹ Ezra Klein, *Newt Gingrich’s Health-Care Problem—and the Republican Party’s*, WASH. POST. (Dec. 27, 2011), https://www.washingtonpost.com/blogs/ezra-klein/post/newt-gingrichs-health-care-problem—and-the-republican-partys/2011/08/25/gIQANN5YKP_blog.html?utm_term=.15676a95c067. The Heritage Foundation has also tried to reinvent history, and claim Stuart Butler’s plan was unveiled in opposition to the Clinton plan, but the *Wall Street Journal*

President Obama, during his 2008 presidential campaign, attacked Hillary Clinton for supporting an individual mandate: “One Obama TV ad drove the point home: ‘Hillary Clinton’s attacking, but what’s she not telling you about her health care plan? It forces everyone to buy insurance, even if you can’t afford it, and you pay a penalty if you don’t.’”²⁰ Economist Paul Krugman used his *New York Times* column in 2007 to rebuke Obama for “attacking his rivals by echoing right-wing talking points.”²¹ Krugman stated that “[a]s a practical matter, letting people opt out if they don’t feel like buying insurance would make insurance substantially more expensive for everyone else.”²²

As president, Obama switched positions and publicly supported an individual mandate by July 2009.²³

The need for the mandate was articulated in a September 2009 speech by President Obama to a joint session of Congress.²⁴ Moving from previous generalities, the President prescribed some specifics, including an individual mandate to facilitate new protections like guaranteed issue of coverage: “[U]nless everybody does their part, many of the insurance reforms we seek—especially requiring insurance companies to cover pre-existing conditions—just can’t be achieved.”²⁵

has noted “Bill Clinton became president more than 3½ years after the monograph’s publication.” James Taranto, *Heritage Rewrites History*, WALL STREET J. (Feb. 8, 2012), <https://www.wsj.com/articles/heritage-rewrites-history-1383157826>. There is considerable irony in the fact that Utah Senator Orrin Hatch inserted into the 2017 tax law the language repealing the mandate’s penalty. See Haberkorn et al., *supra* note 1. A 2010 article noted that “Hatch and several other senators who now oppose the so-called individual mandate actually supported a bill that would have required it.” Julie Rovner, *Republicans Spurn Once-Favored Health Mandate*, NAT’L PUB. RADIO (Feb. 15, 2010), <https://www.npr.org/templates/story/story.php?storyId=123670612>.

²⁰ Andrew Cline, *How Obama Broke His Promise on Individual Mandates*, ATLANTIC (June 29, 2012), <https://www.theatlantic.com/politics/archive/2012/06/how-obama-broke-his-promise-on-individual-mandates/259183/>; see also Michael Cooper, *It Was Clinton vs. Obama on Health Care*, N.Y. TIMES (Nov. 16, 2007), <https://www.nytimes.com/2007/11/16/us/politics/16facts.html> (“The Obama campaign argues that a mandate might not be enforceable, and that if health insurance is affordable and attractive, most people will enroll.”).

²¹ Paul Krugman, *Mandates and Mudslinging*, N.Y. TIMES (Nov. 30, 2007), <https://www.nytimes.com/2007/11/30/opinion/30krugman.html>.

²² *Id.*

²³ See Angie Drobnic Holan, *Obama Flip-Flops on Requiring People to Buy Health Care*, POLITIFACT (July 20, 2009), <https://www.politifact.com/truth-o-meter/statements/2009/jul/20/barrack-obama/obama-flip-flops-requiring-people-buy-health-care/> (“Obama was vigorous in his attacks on Clinton for including an individual mandate in her plan. Now that the Democrats in the House have included a mandate in health reform legislation, he’s fine with it. He admitted he changed position in the interview with CBS. Full Flop!”).

²⁴ See *Obama’s Health Care Speech to Congress*, N.Y. TIMES (Sept. 9, 2009), <https://www.nytimes.com/2009/09/10/us/politics/10obama.text.html>.

²⁵ *Id.*

Conservative state attorney generals brought suit challenging the ACA, and, on June 28, 2012, the U.S. Supreme Court upheld the law, even though Chief Justice John Roberts, in the 5–4 decision, agreed with a lower court that the ACA was unsustainable under the Commerce Clause: “Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority.”²⁶

That determination was a vastly more coherent refinement of an incoherent question asked during oral argument by archconservative Justice Scalia: “Could you define the market—everybody has to buy food sooner or later, so you define the market as food, therefore, everybody is in the market; therefore, you can make people buy broccoli.”²⁷ Yet, it was also a mysterious opinion in many respects. Health care is not broccoli. As law professors Michael Graetz and Jerry Mashaw wrote in the *Harvard Law and Policy Review*, “[n]o one denies that health insurance is interstate commerce. And no one can deny that the cross-subsidies of paying customers to non-paying customers are very substantial.”²⁸ The test should be “whether the thing that is being regulated substantially affects interstate commerce.”²⁹

While rejecting the Obama Administration’s argument that the ACA was proper interstate commerce regulation, Roberts nonetheless accepted the Administration’s second argument that “even if Congress lacks the power to direct individuals to buy insurance, the only effect of the individual mandate is to raise taxes on those who do not do so, and thus the law may be upheld as a tax.”³⁰ He found that “taxes that seek to influence conduct are nothing new.”³¹ Thus the individual mandate’s “shared responsibility

²⁶ Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 552 (2012).

²⁷ Byron Tau, *Scalia Wonders About a Broccoli Mandate*, POLITICO (Mar. 27, 2012), <https://www.politico.com/blogs/politico44/2012/03/scalia-wonders-about-a-broccoli-mandate-118823>. A perhaps-hungry Scalia belabored this obscure argument in his dissenting opinion:

Although an individual *might* buy a car or a crown of broccoli one day, there is no certainty she will ever do so. And if she eventually wants a car or has a craving for broccoli, she will be obliged to pay at the counter before receiving the vehicle or nourishment. She will get no free ride or food, at the expense of another consumer forced to pay an inflated price.

Sebelius, 567 U.S. at 608 (Scalia, J., dissenting).

²⁸ Michael J. Graetz & Jerry L. Mashaw, *Constitutional Uncertainty and the Design of Social Insurance: Reflections on the Obamacare Case*, 7 HARV. L. & POL’Y REV. 343, 348 (2013).

²⁹ *Id.*

³⁰ *Sebelius*, 567 U.S. at 547.

³¹ *Id.* at 567.

payment merely imposes a tax citizens may lawfully choose to pay in lieu of buying health insurance.”³² The mandate was constitutional.³³

This reasoning was reminiscent of work under the administration of Franklin Roosevelt to clear the way for what became Social Security.³⁴ The administration sought the informal advice of a couple Supreme Court justices who might rule on the constitutionality of their efforts.³⁵ As Kirstin Downey, in her biography of Frances Perkins, Roosevelt’s labor secretary, relates:

Justice Harlan F. Stone had whispered some words of advice as well. At an afternoon party at Stone’s home, Frances was drinking tea with the justice when he asked her how things were going. She told him they were wrestling with how to establish an economic security program. Stone looked around to see if anyone was listening, then leaned in toward Frances. “The taxing power, my dear, the taxing power,” he said in quiet tones.³⁶

Mitt Romney’s involvement with the 2006 health care reform in Massachusetts made him fairly-incoherent in criticizing the ACA in his 2012 presidential campaign, as an excerpt from a Republican debate in an exchange with former Pennsylvania Senator Rick Santorum revealed:

“If you don’t want to buy insurance, then you have to help pay for the cost of the state picking up your bill, because under federal law if someone doesn’t have insurance, then we have to care for them in the hospitals, give them free care,” said Romney. “So we said, no more, no more free riders. We are insisting on personal responsibility. Either get the insurance or help pay for your care.”

“Does everybody in Massachusetts have a requirement to buy health care?” asked Santorum?

³² *Id.* at 568.

³³ *Id.* at 588. “The Affordable Care Act’s requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.” *Id.* at 574.

³⁴ KIRSTIN DOWNEY, *THE WOMAN BEHIND THE NEW DEAL: THE LIFE AND LEGACY OF FRANCES PERKINS—SOCIAL SECURITY, UNEMPLOYMENT INSURANCE, AND THE MINIMUM WAGE* 235–36 (Anchor Books 1st ed., 2010).

³⁵ *Id.*

³⁶ *Id.*

“Everyone has a requirement to either buy it or pay the state for the cost of providing them free care,” Romney shot back. “Because the idea of people getting something for free when they could afford to care for themselves is something that we decided in our state was not a good idea.”³⁷

A more articulate, conservative “personal responsibility” defense of the individual mandate could not be found.³⁸ Thus, in the first presidential debate between Romney and President Obama, Obama was able to say of Romney, “Governor Romney did a good thing, working with Democrats in the state to set up what is essentially the identical model and as a consequence people are covered there.”³⁹

Yet the mandate was easily the most unpopular aspect of the ACA, and one cannot help but harken back to the teaching moment then-candidate Obama had in the 2008 Democratic nominating process, when instead he, as Paul Krugman described it, assailed the idea of a mandate, “in the effort to defend his plan’s weakness . . . giving aid and comfort to the enemies of reform.”⁴⁰

Jonathan Gruber is “an M.I.T. health economist who helped design the Massachusetts health reforms on which Obamacare was based and then advised the Obama administration on that program’s design.”⁴¹ He was recorded making a statement that became a cause célèbre among conservatives, and helped further poison the well of public opinion:

At an academic panel in 2013, he said that “this bill was written in a tortured way to make sure” the Congressional Budget Office “did not score the mandate as taxes.” He also said that “lack of transparency is a huge political advantage,” and added, “Call it the stupidity of the American voter or whatever, but basically that was really, really critical to

³⁷ Julie Rovner, *Romney’s Unlikely and Persuasive Defense of the ‘Individual Mandate’*, NAT’L PUB. RADIO (Jan. 27, 2012, 5:22 PM), <https://www.npr.org/sections/health-shots/2012/01/27/145993578/romneys-unlikely-and-persuasive-defense-of-the-individual-mandate>.

³⁸ Cf. Avik Roy, *The Tortious History of Conservatives and the Individual Mandate*, FORBES (Feb. 7, 2012, 3:32 PM), <https://www.forbes.com/sites/theapothecary/2012/02/07/the-tortuous-conservative-history-of-the-individual-mandate/#828efd55fe95> (explaining the alternatives that conservatives have developed to Obamacare and the individual mandate).

³⁹ *October 3, 2012 Debate Transcript*, COMM’N ON PRESIDENTIAL DEBATES, <http://www.debat.es.org/index.php?page=october-3-2012-debate-transcript> (last visited Nov. 4, 2018).

⁴⁰ Krugman, *supra* note 21.

⁴¹ Neil Irwin, *The Jonathan Gruber Controversy and Washington’s Dirty Little Secret*, N.Y. TIMES (Nov. 12, 2014), <https://www.nytimes.com/2014/11/13/upshot/the-jonathan-gruber-controversy-and-washingtons-dirty-little-secret.html>.

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getting the thing to pass.”⁴²

According to a November 2017 Kaiser Health Foundation poll, “[t]he majority of the public (55 percent) support the idea of eliminating the requirement for all Americans to have health insurance or else pay a fine as part of the Republican tax plan.”⁴³

In his 2018 State of the Union Address, President Trump crowed that “[w]e eliminated an especially cruel tax that fell mostly on Americans making less than \$50,000 a year, forcing them to pay tremendous penalties, simply because they couldn’t afford government-ordered health plans. We repealed the core of the disastrous Obamacare—the individual mandate is now gone. Thank heavens.”⁴⁴

Trump’s celebrations and handwringing by ACA supporters, may have been premature.⁴⁵

II. STATE EFFORTS TO ENACT INDIVIDUAL MANDATES

It is unclear how much of a behavior modifier the ACA individual mandate’s penalty ever was. As the National Association of Insurance Commissioners had noted in 2012, “[i]n a guaranteed

⁴² *Id.*

⁴³ Ashley Kirzinger et al., *Kaiser Health Tracking Poll—November 2017: The Role of Health Care in the Republican Tax Plan*, HENRY J. KAISER FAM. FOUND. (Nov. 15, 2017), <https://www.kff.org/health-reform/poll-finding/kaiser-health-tracking-poll-november-2017-the-role-of-health-care-in-the-republican-tax-plan/>. Paradoxically, what is left has become more popular than ever, with ACA support reaching 54% in February 2018, its highest point up to that date. See Ashley Kirzinger et al., *Kaiser Health Tracking Poll – February 2018: Health Care and the 2018 Midterms, Attitudes Towards Proposed Changes to Medicaid*, HENRY J. KAISER FAM. FOUND. (Mar. 1, 2018) <https://www.kff.org/health-reform/poll-finding/kaiser-health-tracking-poll-february-2018-health-care-2018-midterms-proposed-changes-to-medicaid/>. In West Virginia, “where approval of President Trump is near the country’s highest,” incumbent Democratic Senator Joe Manchin made his support for those with preexisting conditions the centerpiece of his 2018 re-election campaign. See Trip Gabriel, *Manchin Counts on Health Care to Stave off Republican Tide in West Virginia*, N.Y. TIMES (Sept. 8, 2018), <https://www.nytimes.com/2018/09/08/us/politics/manchin-west-virginia-healthcare.html>.

⁴⁴ *Fact Check: Trump’s State of the Union Address*, NAT’L PUB. RADIO (Jan. 30, 2018, 8:25 PM), <https://www.npr.org/2018/01/30/580378279/trumps-state-of-the-union-address-annotate>. As usual, Trump overstated his case. As the New York Times reported, “[w]hile the individual mandate may be dead, the employer mandate—the requirement that many companies offer health insurance to their workers or pay a penalty—is very much alive.” Alan Rappeport, *Trump Says He Got Rid of Obamacare. The I.R.S. Doesn’t Agree.*, N.Y. TIMES (May 6, 2018), <https://www.nytimes.com/2018/05/06/business/trump-obamacare-irs.html>.

⁴⁵ See Katie Jennings, *New Jersey Will Become Second State to Enact Individual Health Insurance Mandate*, POLITICO (May 30, 2018, 7:01 PM), <https://www.politico.com/states/new-jersey/story/2018/05/30/new-jersey-becomes-second-state-to-adopt-individual-health-insurance-mandate-442183>.

issue, no pre-existing condition environment, the reward for waiting to obtain coverage until it is needed, or switching coverage to minimize cost and maximize benefits will always exist, even with the tax penalties in federal law.”⁴⁶

Moreover, as a Congressional Budget Office presentation noted, “[r]epealing the mandate is not the same as never having had a mandate.”⁴⁷ Among the unanswered questions:

[1] How much will the knowledge about the benefits of having health insurance, subsidies, and the enrollment process that consumers have already gained affect their decisions in the future?

[2] How much has the mandate permanently changed the stigma associated with Medicaid?

[3] How much persistence in enrollment can we expect?⁴⁸

Perhaps one benefit to the ceaseless fighting over the ACA is that we have come a long way in consumer education on health insurance since March 23, 2010, when the ACA was signed.⁴⁹

Still, New Jersey was the first state to enact an individual mandate to go along with still-existing Massachusetts law.⁵⁰ In New Jersey’s individual market, a proposed health insurance rate hike averaging 5.8% for 2019 became an average decrease of 9.3%.⁵¹ Democratic Governor Phil Murphy “credited two laws he signed in May for

⁴⁶ Letter from the Nat’l Ass’n of Ins. Comm’rs to the U.S. Ctr. for Medicare & Medicaid Serv. (Dec. 19, 2012), http://www.naic.org/documents/index_health_reform_comments_121219_mark_et_reform.pdf.

⁴⁷ Alexandra Minicozzi, *Modeling the Effects of the Individual Mandate on Health Insurance Coverage*, CONGRESSIONAL BUDGET OFF. 14 (Sept. 15, 2017), <https://www.cbo.gov/system/files?file=115th-congress-2017-2018/presentation/53105-presentation.pdf>.

⁴⁸ *Id.*

⁴⁹ See Alison Kodjak, *NPR/Ipsos Poll Reveals What Americans Know About the Affordable Care Act*, NAT’L PUB. RADIO (Jan. 12, 2017, 4:32 PM), <https://www.npr.org/2017/01/12/509542799/npr-ipsos-poll-reveals-what-americans-know-about-the-affordable-care-act>; Alison Kodjak, *We Asked People What They Know About Obamacare. See if You Know the Answers*, NAT’L PUB. RADIO (Jan. 12, 2017, 2:55 AM), <https://www.npr.org/2017/01/12/509314717/we-asked-people-what-they-know-about-obamacare-see-if-you-know-the-answers>.

⁵⁰ See Jennings, *supra* note 45; see also Assemb. B. 3380, 218th Leg. (N.J. 2018) (discussing the purpose of the bill).

⁵¹ Christian Hetrick, *Obamacare Insurance Rates to Fall 9.3 Percent in New Jersey*, THE INQUIRER (Sept. 7, 2018), http://www2.philly.com/philly/business/consumer_news/obamacare-insurance-rates-new-jersey-phil-murphy-individual-mandate-affordable-care-act-20180907.html.

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producing the rate reduction: one creating an individual health insurance mandate, and another establishing a reinsurance program.”⁵²

The New Jersey mandate took effect almost immediately.⁵³ Under the New Jersey Health Insurance Market Preservation Act, “[a] taxpayer shall, for each month beginning after December 31, 2018, ensure that the taxpayer, if an applicable individual, and any dependent of the taxpayer who is an applicable individual, is covered under minimum essential coverage for that month.”⁵⁴ The penalty, or “State shared responsibility tax,” is equal to that which existed under the ACA.⁵⁵

As one commentator stated, “[n]o state has moved faster or more aggressively to shore up its ACA markets than Jersey.”⁵⁶ He noted, “New Jersey also bans short-term insurance plans that don’t cover pre-existing conditions. The Trump administration has loosened the rules for those plans, but states are free to enact their own restrictions.”⁵⁷

The District of Columbia adopted an individual mandate, and the U.S. Senate rejected, in a 54-44 vote in 2018, an effort by Republican

⁵² *Id.* The reinsurance component required approval by the Trump Administration, which was granted. See Susan K. Livio, *Trump Administration Just Helped N.J. Preserve an Important Part of Obamacare*, N.J. POLITICS (Aug. 16, 2018), https://www.nj.com/politics/index.ssf/2018/08/trump_administration_oks_strategy_to_preserve_one.html. Similarly, the Administration approved a reinsurance plan from Republican Wisconsin Gov. Scott Walker, among others. J. Carlisle Larsen, *Trump Administration Approves Walker’s \$200 Million Reinsurance Plan*, WIS. PUB. RADIO (July 30, 2018, 3:05pm), <https://www.wpr.org/trump-admin-istration-approves-walkers-200-million-reinsurance-plan>; see also *Wisconsin Republican Gov. Scott Walker Seeks Rare Third Term*, NAT’L PUB. RADIO (Nov. 3, 2018), <https://www.npr.org/2018/11/03/663976517/wisconsin-republican-gov-scott-walker-seeks-rare-third-term> (establishing Governor Scott Walker as politically Republican). Reinsurance is not a focus of this article, but as a Harvard professor explains:

Reinsurance is insurance for insurers or large companies that want to protect themselves against very large losses. For companies that provide insurance to individuals through the ACA marketplaces, reinsurance can help protect them against very high-cost enrollees whose medical claims can reach into the hundreds of thousands or even millions, thus reducing the pressure to increase premiums on everyone else.

Katherine Swartz, *‘Reinsurance’ Program Critical to Shoring Up the ACA*, HARV. SCH. OF PUB. HEALTH (Aug. 14, 2017), <https://www.hsph.harvard.edu/news/features/reinsurance-aca/>.

⁵³ See N.J. Assemb. B. 3380.

⁵⁴ *Id.* § 3(a).

⁵⁵ *Id.* § 3(b).

⁵⁶ Sam Baker, *Blue States Dig In on the ACA*, AXIOS (Aug. 17, 2018), <https://www.axios.com/aca-new-jersey-blue-states-health-care-insurance-9bf22591-9b15-4792-84c1-57842feb12cb.html>.

⁵⁷ *Id.*

Texas Senator Ted Cruz to invalidate the District's action.⁵⁸ As the *Washington Post* reported, “[d]uring debate on the Senate floor, Cruz trumpeted the repeal of the individual mandate as part of tax cut legislation enacted last year and painted the District’s mandate penalty as a tax increase on low-income city residents.”⁵⁹ That was clearly a false statement, as those with incomes of up to 222% of the poverty level (those 21 and older), and up to 324% of the poverty level (ages 20 and under), are not subject to the penalty.⁶⁰

Under Republican Governor Phil Scott, Vermont also enacted an individual mandate, in 2018.⁶¹ However, “the details, including the financial penalty and enforcement mechanisms, will be determined during the 2019 legislative session. The Vermont mandate won’t go into effect until Jan[uary] 1, 2020.”⁶² The bill attracted bipartisan support. “Rep. Anne Donahue, R-Northfield and vice chair of the House Health Care Committee, said an individual mandate goes hand-in-hand with federal law requiring insurers to cover people with pre-existing medical issues.”⁶³ One consumer voice expressed concern:

The Office of the Health Care Advocate also is supposed to be involved in the state’s individual mandate outreach efforts.

Mike Fisher, Vermont’s chief health care advocate, said it might be a tough sell in some cases. While Fisher understands the “public interest” argument for maintaining health insurance, he also said it’s difficult to force costly coverage on those who are already struggling to make ends meet.

“As a consumer advocate, we want to speak up for people who can’t afford it,” Fisher said. “It just does not fit into their

⁵⁸ See Jenna Portnoy, *Senate Blocks Effort to Kill D.C.’s Version of Affordable Care Act’s Individual Mandate*, WASH. POST (Aug. 2, 2018), https://www.washingtonpost.com/local/dc-politics/thats-not-democracy-senate-kills-effort-to-stymie-dcs-version-of-the-affordable-care-act/2018/08/02/246e2c94-966d-11e8-810c-5fa705927d54_story.html?noredirect=on&utm_term=.2dc694b8f63e.

⁵⁹ *Id.*

⁶⁰ D.C. CODE § 47-5102(b)(2)(A)(i)–(ii) (2018).

⁶¹ See Jennings, *supra* note 45.

⁶² *Id.*

⁶³ Mike Faher, *Scott Signs Individual Mandate Health Insurance Bill*, VTDIGGER (June 4, 2018), <https://vtdigger.org/2018/06/04/scott-signs-mandatory-health-insurance-bill/>.

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family's budget."⁶⁴

In the state of Washington, individual mandate legislation introduced in 2018 came with a big unknown.⁶⁵ “How the individual mandate would be enforced is an outstanding question because Washington State lacks an income tax, which is the vehicle for the ACA penalty.”⁶⁶ The bill passed the state's Democratic Senate, but was killed by its Democratic House.⁶⁷

Similarly, in overwhelmingly-Democratic Hawaii, a bill to enact an individual mandate passed the Senate, 24-1, and then died in the House.⁶⁸ The bill's intent section stated: “Insurance companies and Congressional Democrats have warned that premiums will increase and insurance markets will be weakened if the tax penalties for going without health insurance are eliminated.”⁶⁹ However, Hawaii's largest health insurer, with a membership of 729,617, the Hawaii Medical Service Association, was very profitable in 2018 and proposed only a 2.7% premium increase for 2019.⁷⁰

In Maryland, a proposed individual mandate approach was praised in a *Washington Post* editorial:

As with the defunct federal mandate, Marylanders would be charged a fee on their tax forms if they failed to buy coverage. But the state would apply that fee to enroll the uninsured in

⁶⁴ *Id.* The author once expressed concern in a column about those “forced into the unloving embrace of a largely-unfettered insurance industry—with the government acting as industry leg-breaker and imposing fines if citizens do not pay the industry's inflated prices.” Brendan Williams, *Health Care Deform?*, SEATTLE POST-INTELLIGENCER (Dec. 21, 2009, 3:36 PM), <https://blog.seattlepi.com/brendanwilliams/2009/12/21/health-care-deform/>.

⁶⁵ See Ryan Blethen, *Bill by Bill, Democrats are Trying to Create a Stable State Health-Insurance System*, SEATTLE TIMES (Jan. 27, 2018, 8:00 AM), <https://www.seattletimes.com/seattle-news/health/bill-by-bill-democrats-are-trying-to-create-a-stable-state-health-insurance-system/>.

⁶⁶ *Id.*

⁶⁷ See Louise Norris, *Washington Health Insurance Marketplace: History and News of the State's Exchange* (June 4, 2018), <https://www.healthinsurance.org/washington-state-health-insurance-exchange/> (“S[enate] B[ill] 6084 passed the Senate on February 7 by a vote of 25 to 23, but did not advance in the House.”). See also S.B. 6084, 65th Leg., Reg. Sess. (Wash. 2018), for additional bill tracking information.

⁶⁸ See Emily Boerger, *An Update on Health Policy Bills in Hawaii* (May 7, 2018), <https://stateofreform.com/featured/2018/05/an-update-on-health-policy-bills-in-hawaii/>. See also S.B. 2924, 29th Leg., Reg. Sess. (Haw. 2018), for additional tracking information.

⁶⁹ Haw. S.B. 2924 at § 1.

⁷⁰ Kristen Consillio, *HMSA Profit Soars; Kaiser Loss Widens*, HONOLULU STAR-ADVERTISER (Aug. 16, 2018, 12:05 AM), <http://www.staradvertiser.com/2018/08/16/business/hmsa-profit-soars-kaiser-loss-widens/>. Moreover, the nonprofit's “reserve, set aside to protect members in the case of a public health emergency, rose to \$509 million, or \$698 per member, from \$469.6 million, or \$641 per member.” *Id.*

health-care plans. Those who are due federal premium subsidies and can get a zero-dollar health-care plan would be automatically enrolled, unless they opted out. Those who would have to kick in their own money could use the fee toward the cost of insurance during the next open enrollment period. Rather than a penalty, the proposal's backers call it a health-care "down payment," reflecting the less punitive nature of the policy.⁷¹

No action was taken in 2018, prompting an election year letter from Maryland's Democratic members of Congress to Republican Governor Larry Hogan, urging him to support a mandate.⁷²

With insurers crediting a new state reinsurance law, some Marylanders in the individual market stood to see a significant 2019 rate decrease even absent a mandate: "CareFirst is requesting a rate drop of 22.3 percent for its 2019 HMO plans, and Kaiser is requesting a 7.8 percent HMO rate decrease."⁷³

Rhode Island has contemplated its own individual mandate, and enacted a reinsurance program in 2018.⁷⁴ In announcing the 2019 rates for the individual market, the Office of the Health Commissioner noted that "[t]he state's Market Stability Workgroup, comprised of diverse stakeholders representing health insurers, employers, healthcare providers and consumers, will reconvene to advise OHIC and HealthSource RI on establishing the reinsurance program. The Workgroup will also examine further measures, including a state shared responsibility requirement."⁷⁵

Rhode Island has been comparatively fortunate, with "the second-

⁷¹ Editorial Bd., *Maryland's Ingenious Plan to Fix Obamacare*, WASH. POST (Mar. 22, 2018), https://www.washingtonpost.com/opinions/marylands-ingenious-plan-to-fix-obamacare/2018/03/22/ec387a7c-2d36-11e8-8688-e053ba58f1e4_story.html?utm_term=.706b317e164e.

⁷² See Press Release, U.S. House Member John Sarbanes, Maryland Democratic House Members Urge Gov. Hogan to Take Immediate Action to Protect Marylanders from Rising Health Care Costs and Insurance Premiums (June 21, 2018), <https://sarbans.house.gov/media-center/press-releases/maryland-democratic-house-members-urge-gov-hogan-to-take-immediate>; see also Brian Witte, *Hogan Signs Bills on Health Care, School Safety*, U.S. NEWS (Apr. 10, 2018, 4:06 PM), <https://www.usnews.com/news/best-states/maryland/articles/2018-04-10/hogan-signs-bills-on-health-care-school-safety> ("Another stalled bill would have created an individual health care mandate in Maryland in response to Washington gutting it at the federal level.").

⁷³ Morgan Eichensehr, *With New Program, Maryland's ACA Health Insurers Now Seek Decrease to Premiums*, BALT. BUS. J. (Sept. 13, 2018, 2:47 PM), <https://www.bizjournals.com/baltimore/news/2018/09/13/with-new-program-marylands-aca-health-insurers-now.html>.

⁷⁴ See Press Release, State of R.I. Office of the Health Ins. Comm'r, OHIC Approves Commercial Health Insurance Rates for 2019 (Aug. 17, 2018), <http://www.ohic.ri.gov/document/s/2018%20Rate%20Review%20Documents/2019-rates-announcement-FINAL.pdf>.

⁷⁵ *Id.*

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lowest benchmark premium growth rate in the United States from 2014-2018, and Rhode Island's 2018 benchmark plan rate was the lowest in the nation."⁷⁶

In California, there has been no great enthusiasm for an individual mandate, with some noting that health insurance enrollment success there was attributable to other factors:

Debra Kelch, president of the Insure the Uninsured Project, said it wasn't just the mandate that got people on board with health insurance. "In California, we did an extended enrollment timeline, we do additional marketing, we do a lot of outreach in communities," she said. "There's all these factors."⁷⁷

While California legislators were reticent, insurers favored a mandate:

No lawmaker has formally endorsed an individual mandate bill, but some are considering it. The California Association of Health Plans backs the idea.

"We are greatly concerned about the impact the federal repeal will have on premiums for people purchasing their own coverage, combined with the hundreds of thousands of Californians who would [sic] choose not to purchase coverage without a mandate in place," said Charles Bacchi, president and CEO for the California Association of Health Plans.⁷⁸

A study predicted that "[w]ith the individual market tilted toward less-healthy people, California marketplace plans could see premium increases for 2019 of between 12% and 16%."⁷⁹

Yet that study proved to be unduly pessimistic.⁸⁰ As a July 2018

⁷⁶ *Id.*

⁷⁷ Sammy Caiola, *Is a Statewide Insurance Mandate Next for California?*, CAP. PUB. RADIO (Feb. 5, 2018), <http://www.capradio.org/articles/2018/02/05/is-a-statewide-insurance-mandate-next-for-california/>.

⁷⁸ Angela Hart, *Is Your Health Care Too Expensive? California Has Some Ideas to Bring Costs Down*, SACRAMENTO BEE (Mar. 14, 2018, 7:04 PM), <https://www.sacbee.com/news/politics-government/capitol-alert/article205092214.html>.

⁷⁹ Jaclyn Cosgrove, *Killing Obamacare's Coverage Mandate Will Cut Enrollment but Leave California's Marketplace Stable, Study Says*, L.A. TIMES (Mar. 1, 2018, 3:55 PM), <http://www.latimes.com/business/la-fi-tax-mandate-study-20180301-story.html>.

⁸⁰ *See id.*

Sacramento Bee article reported, “Covered California announced Thursday that it expects to increase its health insurance premiums by a statewide average of 8.7 percent in 2019, double what it would have been if Congress had not dropped a tax penalty that encouraged U.S. citizens to maintain health insurance.”⁸¹ The executive director of the Covered California exchange noted that “by spending aggressively on marketing, roughly \$100 million last year, Covered California has been able to maintain a healthy mix of enrollees.”⁸²

III. HEALTH INSURANCE PREMIUMS APPEAR UNCONNECTED FROM AN INDIVIDUAL MANDATE

To be sure, not every state will have the luxury of an ACA-supporting state government, like California’s, willing to drum up enrollment.⁸³ But how, then, do you explain North Carolina? As a July 2018 news article reported, “North Carolina’s largest health insurer said Tuesday it’s cutting some individual premiums *for the first time in over a quarter century*, but next year’s savings on subsidized ‘Obamacare’ coverage would have been much larger if Washington had left the law alone.”⁸⁴ Proposed rates for Blue Cross and Blue Shield of North Carolina were lower by 4.1% on average than the previous year.⁸⁵

This was not due to any special outreach – North Carolina does not have its own ACA exchange, deferring to the federal Healthcare.gov

⁸¹ Cathie Anderson, *Covered California Premiums Will Rise on Average 8.7%*. See *the Increase in Your Area*, SACRAMENTO BEE (July 19, 2018, 10:59 AM), <https://www.sacbee.com/news/local/health-and-medicine/article215169525.html>. As had New Jersey, California also banned short-term insurance plans that President Trump has touted as affordable alternatives to ACA coverage, but which could further siphon away younger, healthier consumers from risk pools. See Felicia Alvarez, *Ban on Short-Term Health Plans Heads to the Governor’s Desk*, SACRAMENTO BUS. J. (Aug. 21, 2018, 1:51 PM), <https://www.bizjournals.com/sacramento/news/2018/08/21/ban-on-short-term-health-plans-heads-to-the.html> (“[S]hort-term plans may have had the potential to boom across the state. In March, 12 percent of Covered California enrollees indicated that they would want to purchase a short-term plan, according to a survey by the Henry J. Kaiser Family Foundation.”); Sarah Gantz, *Premiums for ACA Health Plans to Decline 16 Percent in Pa.*, INQUIRER DAILY NEWS (Oct. 11, 2018), <http://www2.philly.com/philly/health/obamacare-aca-health-insurance-premiums-2019-20181011.html>.

⁸² Anderson, *supra* note 81.

⁸³ Compare *id.* (aggressive marketing for ACA in California), with Ely Portillo, *Goodwin Faces Rematch with Causey for Insurance Commissioner*, NEWS & OBSERVER (Oct. 7, 2016, 9:09 PM), <https://www.newsobserver.com/news/politics-government/election/article106834137.html> (minimal expansion of Medicaid under ACA in North Carolina).

⁸⁴ Emery P. Dalesio, *NC’s Blue Cross Cutting ‘Obamacare’ Prices Despite Changes*, SEATTLE TIMES (July 31, 2018, 8:52 AM), <https://www.seattletimes.com/nation-world/ncs-blue-cross-cutting-obamacare-prices-despite-changes/> (emphasis added).

⁸⁵ See *id.*

for subsidized enrollment, and its Republican elected insurance commissioner is an ardent ACA foe who actually believes insurers should be able to opt out rate regulation.⁸⁶

Or what are we to make of a conservative state like Arizona? There, one analysis suggested the average 2019 premium “is expected to drop from the current rate of about \$630 a month to \$604—before government subsidies.”⁸⁷ Arizona was among eleven states where 2019 premiums were to decrease.⁸⁸

While, after enacting its individual mandate and other market reforms, New Jersey’s average 9.3% premium decrease for 2019 is impressive, it pales next to a proposed average decrease of 14.8% for BlueCross BlueShield of Tennessee—in a state that enacted no market reforms.⁸⁹

Even in the nation’s unhealthiest state,⁹⁰ analysis showed “premiums in ‘Obamacare’s’ health insurance marketplace will rise only 0.2 percent in Mississippi next year.”⁹¹

It may be in some states, insurers are just trying to use the mandate’s repeal as an excuse for higher rates, especially where policymakers are most defensive of insurers’ excesses, and the ACA.⁹² In Washington, for example, the Democratic elected Insurance Commissioner approved rate increases for the state’s health exchange that averaged 14% for 2019.⁹³ That was far in excess, for

⁸⁶ See Portillo, *supra* note 83 (“Causey says he’ll be ‘on the front lines’ fighting the federal health insurance overhaul.”).

⁸⁷ Alexis Egeland, *Arizona Health Premiums Likely to Drop in 2019 After Years of Increases*, AZCENTRAL.COM (Sept. 11, 2018, 6:00 AM), <https://www.azcentral.com/story/news/local/arizona-health/2018/09/11/health-premiums-likely-decrease-2019/1262355002/>.

⁸⁸ *Id.*

⁸⁹ See Brett Kelman, *After Years of Price Hikes, Obamacare Likely to Be Cheaper Next Year Across Tennessee*, TENNESSEAN (Aug. 22, 2018, 1:03 PM), <https://www.tennessean.com/story/news/2018/08/22/tennessee-obamacare-cheaper-bluecross-celtic-insurance-memphis/1063969002/>.

⁹⁰ See, e.g., Anna Wolfe, *Mississippi Again Unhealthiest State in the Country*, CLARION LEDGER (Dec. 12, 2017, 12:46 PM), <https://www.clarionledger.com/story/news/politics/2017/12/12/mississippi-again-unhealthiest-state-country/943720001> (“Of the 35 countries in the Organization for Economic Co-operation and Development, only Turkey and Mexico have higher infant mortality rates than Mississippi.”).

⁹¹ “Obamacare” Insurance Rates Will Stay Level in Mississippi, U.S. NEWS (Sept. 7, 2018, 12:17 PM), <https://www.usnews.com/news/best-states/mississippi/articles/2018-09-07/obamacare-re-insurance-rates-will-stay-level-in-mississippi>.

⁹² See James T. Mulder, *Cuomo Says NY Won’t Let Health Insurers Profit off Repeal of Individual Mandate*, NYUPSTATE.COM (July 30, 2018), https://www.newyorkupstate.com/news/2018/07/cuomo_says_ny_wont LET_health_insurers_profit_off_repeal_of_individual_mandate.html.

⁹³ See Ryan Blethen, *Get Ready for Higher Premiums on Washington State’s Health-Care Exchange*, SEATTLE TIMES (Sept. 12, 2018, 3:23 PM), <https://www.seattletimes.com/seattle-news/health/washington-states-health-care-exchange-premiums-could-increase-nearly-14-percent/>.

example, of the average 8.8% increase Florida's insurers had proposed,⁹⁴ and Florida's governor is "a fierce critic of the Affordable Care Act."⁹⁵ The 2019 increases will come on top of Washington's 2018 rate increases that were "an average increase of 24 percent for all plans."⁹⁶ And those 2018 increases came on top of average 13.6% increases for 2017 that the insurance commissioner excused as "a one-time adjustment."⁹⁷ And yet—while raising rates—the dominant insurers, all nonprofits, have been sitting on unregulated billion-dollar reserves.⁹⁸

The sympathy ploy strategy did not succeed everywhere.

In New York, Democratic Governor Andrew Cuomo "said in a statement he has directed the state Department of Financial Services to reject insurer attempts to 'opportunistically profit on the scare tactics and assault from the White House and Congress.'"⁹⁹ And, indeed, his administration cut insurers' proposed increases "by nearly two-thirds."¹⁰⁰ As the *New York Post* noted, "[i]t was the largest reduction since New York's ObamaCare markets were set up five years ago."¹⁰¹ Insurers complained: "The health insurers' industry representative said the state's rejection of most of the

⁹⁴ See Ron Hurtibise, *South Florida's 3 Obamacare Providers File Proposals to Return in 2019*, S. FLA. SUN SENTINEL (June 22, 2018, 6:35 PM), <http://www.sun-sentinel.com/business/fl-bz-obamacare-plans-rate-filings-in-florida-20180622-story.html>.

⁹⁵ Christine Sexton, *Gov. Rick Scott Won't Talk About Florida's Part in Obamacare Lawsuit*, ORLANDO WEEKLY (June 13, 2018, 5:12 PM), <https://www.orlandoweekly.com/Blogs/archives/2018/06/13/gov-rick-scott-wont-talk-about-floridas-part-in-obamacare-lawsuit>.

⁹⁶ Ryan Blethen, *Insurance Rates Could Rise 9 to 27 Percent for Some ACA Customers, Washington State Officials Say*, SEATTLE TIMES (Oct. 17, 2017, 2:42 PM), https://www.seattletimes.com/seattle-news/health/insurance-rates-could-rise-9-to-27-percent-for-some-aca-customers-washington-state-officials-say/?utm_source=news.google.com&utm_medium=Referral&utm_campaign=rss_editors_picks_feed_homepage.

⁹⁷ JoNel Aleccia, *Health-Insurance Premiums Rise in Washington, But Not as Much as Elsewhere*, SEATTLE TIMES (Oct. 26, 2016, 10:55 AM), <https://www.seattletimes.com/seattle-news/health/health-insurance-premiums-rise-here-in-state-but-not-as-high-as-elsewhere/>.

⁹⁸ See Bob Young, *Health Insurers Seek Double-Digit-Rate Increases in Washington State—Despite Billion-Dollar Reserves*, SEATTLE TIMES (July 16, 2017, 7:00 AM), <https://www.seattletimes.com/seattle-news/health/health-insurers-seek-double-digit-rate-increases-despite-billion-dollar-reserves/>. At the same time Regence is abandoning customers in Washington's market for individual insurance, it is seeking rate increases in the state averaging 30 percent next year and sitting on a \$1.1 billion surplus. *Id.* The article cited the example of a 73-year-old woman who "was furious when she got a letter saying her longtime health insurer, Regence Blue Shield, decided not to offer coverage in King County next year, citing uncertainty in the market," but the article noted that, despite Regence's huge surplus, the state's insurance commissioner was "now more sympathetic to insurers." *Id.*

⁹⁹ Mulder, *supra* note 92.

¹⁰⁰ Carl Campanile, *Cuomo Admin Slashed Majority of Health Insurer Rate Hike Requests*, N.Y. POST (Aug. 3, 2018, 7:22 PM), <https://nypost.com/2018/08/03/cuomo-admin-slashed-majority-of-health-insurer-rate-hike-requests/>.

¹⁰¹ *Id.*

requested rate increases smacked of election-year politics.”¹⁰²

Evidence suggests the insurance industry is fine.¹⁰³ The same insurers complaining about the repeal of the individual mandate were singing the praises of the law that repealed it,¹⁰⁴ as it bestowed fantastical tax breaks upon them.¹⁰⁵ As one article noted, “UnitedHealth Group, the country’s largest insurer, will gain \$1.7 billion in additional earnings in 2018 because of the GOP tax bill, the company’s CEO said.”¹⁰⁶ Aetna was reported as having projected “President Donald Trump’s tax overhaul will increase the company’s gross 2018 adjusted earnings by about \$800 million.”¹⁰⁷

Given another chance at this, reenacting an unpopular individual mandate at the state level, and forcing consumers to buy private health insurance, also seems retrograde in light of the movement in health care opinion.¹⁰⁸ An August 2018 Gallup poll showed only 27% of Americans polled thought our health care system was the better “relative to all other modern industrialized countries.”¹⁰⁹ Indeed,

¹⁰² *Id.*

¹⁰³ See, e.g., Zacks Equity Res., *UnitedHealth Group (UNH) Q3 Earnings Preview: What to Know Ahead of the Release* (Oct. 9, 2018), <https://finance.yahoo.com/news/unitedhealth-group-unh-q3-earnings-143002460.html> (indicating UnitedHealth is the nation’s largest health-care provider and its recent earnings have surpassed market expectations).

¹⁰⁴ See Act of Dec. 22, 2017, Pub. L. No. 115-97, 131 Stat. 2054 (repealing the mandate); Nathaniel Weixel, *UnitedHealth Expects \$1.7B Windfall from Tax Law*, THE HILL (Jan. 16, 2018, 12:35 PM), <https://thehill.com/policy/healthcare/369147-unitedhealth-expects-17b-windfall-from-tax-law>.

¹⁰⁵ See, e.g., Peter Sullivan, *Insurer Credits GOP Tax Law for New Commitment to ObamaCare*, THE HILL (Mar. 12, 2018, 3:25 PM), <https://www.thehill.com/policy/healthcare/377980-insurer-credits-gop-tax-law-for-new-commitment-to-obamacare>.

¹⁰⁶ Weixel, *supra* note 104. The CEO “did not mention that UnitedHealth would be using the additional cash for higher wages for its employees.” *Id.* Vermont Senator Bernie Sanders has written that “in 2017, the CEO of UnitedHealth Group, Dave Wichmann, received \$83.2 million.” Senator Bernie Sanders, *Medicare for All’s Time Has Come*, CNN (Aug. 16, 2018, 8:04 AM), <https://www.cnn.com/2018/08/16/opinions/medicare-for-all-now-bernie-sanders/index.html>. Presumably, his 2018 compensation will be higher. Cigna, however, to Republican praise, announced higher wages as a result of the tax break. See Ana Radelat, *Cigna Says Tax Law Allows it to Raise Worker Pay, Increase Benefits*, CT MIRROR (Jan. 31, 2018), <https://ctmirror.org/2018/01/31/cigna-says-tax-law-allows-it-to-raise-worker-pay-increase-benefits/> (the article did not make clear what proportion of Cigna’s tax bounty went to shareholders).

¹⁰⁷ See Dennis Fitzgerald, *Aetna Projects Trump Tax Overhaul Will Add \$800M to Profit*, FOX BUS. (Jan. 30, 2018), <https://www.foxbusiness.com/markets/aetna-projects-trump-tax-overhaul-will-add-800m-to-profit>.

¹⁰⁸ See Weixel, *supra* note 104; Seth Klamann, *Wyoming’s Barrasso, Cheney and Enzi Back ACA Protections for Pre-existing Medical Conditions*, CASPER STAR TRIBUNE (June 16, 2018), <https://www.trib.com/news/state-and-regional/govt-and-politics/health/wyoming-s-barrasso-cheney-and-enzi-back-aca-protections-for/article-33012ac7-603a-557b-bae1-94469f56c482.html>; Margot Sanger-Katz, *Requiem for the Individual Mandate*, N.Y. TIMES (Dec. 21, 2017), <https://www.nytimes.com/2017/12/21/upshot/individual-health-insurance-mandate-end-impact.html>.

¹⁰⁹ Frank Newport, *Americans’ Views of U.S. Life Compared with Other Nations*, GALLUP (Aug. 22, 2018), <https://news.gallup.com/poll/241238/americans-views-life-compared-nations.a>

“[t]he healthcare system is the only one of the six items measured for which more say the U.S. is the worst or below average than say the U.S. is the best or above average.”¹¹⁰

The public seems ready for more than just doubling-down on an old Heritage Foundation idea.¹¹¹ As one columnist noted of a September 2018 speech by former President Obama, “his highlighting Medicare for all represents the highest-profile political endorsement to date of a reform that finally would allow Americans to enjoy the benefits of an insurance system that provides universal, affordable coverage in almost all other developed countries.”¹¹²

Republicans have moved on to address this threat:

The ad by the Republican Governors Association features a sweeping aerial shot of San Francisco. The voice-over is delivered in a faux surfer-dude accent.

“California has the surf, the beach, the nightlife, the Golden Gate,” the narrator says. “But California also has high taxes, crazy regulations that destroy jobs and radical ideas like *single-payer health care*.”

The commercial isn’t running in California — but in Colorado, where Democratic Rep. Jared Polis is vying for governor against Republican Walker Stapleton. It’s part of a recent explosion of advertising from leading GOP-allied groups attacking Democrats over single-payer health care in races around the country.¹¹³

spx.

¹¹⁰ *Id.*

¹¹¹ Especially as the Heritage Foundation itself long ago moved on, with a senior policy analyst writing in 2017 that health insurance “decisions are for individuals to make, absent government-imposed penalties or ‘taxes’ on their personal choices.” Rachel Greszler, *Why Eliminating Obamacare’s Individual Mandate Should Be Part of Tax Reform*, DAILY SIGNAL (Nov. 27, 2017), <https://www.dailysignal.com/2017/11/27/eliminating-obamacares-individual-mandate-part-tax-reform/>.

¹¹² David Lazarus, *With a Single Sentence, Obama Moves Medicare for All Into the Political Mainstream*, L.A. TIMES (Sept. 11, 2018, 3:00 AM), <https://www.latimes.com/business/lazarus/la-fi-lazarus-obama-medicare-for-all-20180911-story.html>. Even former Senator Max Baucus (D., Mont.), the Senate Finance chair credited for the ACA (and blamed for its shortcomings), has also embraced a single-payer approach. See David Weigel, *Max Baucus, Once a Foe of Single-Payer Health Care, Belatedly Endorses It*, WASH. POST (Sept. 8, 2017), <https://www.washingtonpost.com/news/powerpost/wp/2017/09/08/max-baucus-once-a-foe-of-single-payer-health-care-belatedly-endorses-it> (“At one point, he had single-payer health-care supporters removed from a hearing.”).

¹¹³ Benjy Sarlin et al., *Beyond Obamacare: Democrats Have Plans, GOP Is Out to Destroy*

This begs the question of whether Democrats want to be both accused of socialized medicine *and*, as President Trump has asserted, bestowing taxpayer dollars upon “their pet insurance companies.”¹¹⁴

More concerning than the loss of the federal individual mandate is the position adopted by the Trump Administration to stop defending the ACA’s ban against discrimination based upon pre-existing conditions.¹¹⁵ In a July 2018 letter to House Speaker Paul Ryan (R., Wisconsin), Attorney General Jeff Sessions announced that the Trump Administration would take the side of those arguing that the ACA’s protections were unenforceable without the individual mandate’s penalty: “A coalition of 20 States and two individuals has now brought suit against the federal government, claiming that Section 5000A(a) is unconstitutional under *NFIB* in light of the Jobs Act’s amendment to Section 5000A(c).”¹¹⁶ In other words, they argue,

Them, NBC NEWS (Sept. 11, 2018, 5:21 AM), <https://www.nbcnews.com/politics/politics-news/health-care-under-attack-why-gop-making-single-payer-dirty-n907686>.

¹¹⁴ David Lauter & Noam N. Levey, *What Are the Obamacare Subsidies that Trump Is Trying to Eliminate, and Why Do They Matter?*, L.A. TIMES (Oct. 13, 2017, 12:35 PM), <https://www.latimes.com/la-na-pol-trump-obamacare-questions-20171013-htlstory.html>. Polis won in a landslide. See Jon Murray, *Polis Didn’t Just Win the Colorado Governor’s Race. He Dominated Stapleton*, DENVER POST (Nov. 14, 2018, 9:45 PM), <https://www.denverpost.com/2018/11/13/jared-polis-now-leading-walker-stapleton-by-more-than-10-points-in-colorado-governors-race/>.

¹¹⁵ See Alison Kodjak & Susan Davis, *Trump Administration Move Imperils Pre-Existing Condition Protections*, NAT’L PUB. RADIO (June 8, 2018, 2:54 PM), <https://www.npr.org/2018/06/08/618263772/trump-administration-move-imperils-pre-existing-condition-protection>; Klamann, *supra* note 108.

¹¹⁶ Letter from Jefferson B. Sessions III, U.S. Attorney General, to Paul Ryan, U.S. House Speaker (June 7, 2018), <https://www.justice.gov/file/1069806/download>. This may prove a politically-toxic position. West Virginia Senator Joe Manchin ran a 2018 campaign ad in which he actually shoots the lawsuit, to which his opponent (the state’s attorney general) was a signatory, with a shotgun. See Paul Waldman, *A Remarkable New Ad from a Democrat Shows How Much Health Care Has Shifted*, WASH. POST (Sept. 10, 2018), <https://www.washingtonpost.com/blogs/plum-line/wp/2018/09/10/a-remarkable-new-ad-from-a-democrat-shows-how-much-health-care-has-shifted/>. One writer noted, “[b]y a 2-to-1 margin, U.S. voters disapprove of the U.S. Justice Department’s decision to support a lawsuit that would eliminate popular protections for patients with preexisting conditions under the Affordable Care Act, a new poll shows.” Bruce Japsen, *Poll: 66% of Voters Oppose Trump DOJ’s Move to Gut Patient Protections*, FORBES (June 24, 2018, 9:00 AM), <https://www.forbes.com/sites/brucejapsen/2018/06/24/poll-66-of-voters-oppose-trump-doj-s-move-to-gut-patient-protections/>. Even some conservative Republicans, including Wyoming’s entire Congressional delegation, have voiced opposition to the Trump Administration’s position. See Klamann, *supra* note 108 (“As many as 241,000 Wyomingites have pre-existing conditions, according to the U.S. Department of Health and Human Services.”). The U.S. Senate Health Care Chair, Senator Lamar Alexander (R., Tenn.), issued a critical statement: “The Justice Department argument in the Texas case is as far-fetched as any I’ve ever heard. Congress specifically repealed the individual mandate penalty, but I didn’t hear a single senator say that they also thought they were repealing protections for people with pre-existing conditions.” Press Release, U.S. Sen. Lamar Alexander, Alexander Statement on Texas Obamacare Court Case (June 12, 2018), <https://www.help.senate.gov/record/2018/06/12/record-statement-on-texas-obamacare-court-case>.

how can there be a mandate without enforcement?

Obviously this position, if embraced by the courts, would eviscerate what remains of the ACA.¹¹⁷ A piecemeal approach, enacting individual mandates state-by-state (if that can even be achieved), is not an effective counter to this. State policymakers need to go *forward* on health care, not *backward*. The inconvenient truth about health insurance is that insurers will charge whatever they feel the market can bear and regulators will tolerate.¹¹⁸

e.gov/chair/newsroom/press/alexander-statement-on-texas-obamacare-court-case.

¹¹⁷ See Japsen, *supra* note 116.

¹¹⁸ During debate over what became the ACA, then-Senator Jay Rockefeller (D., W.V.), the Senate Finance Vice Chair, famously said:

[T]he insurance industry does not know how to stop itself. They are a train which just gathers speed, and with no impediments. So what you have to do is put up an impediment—not to stop them because nobody ever will do that, but to slow them down, make it more rational, more reasonable. And that is the public option.

Executive Business Meeting to Consider an Original Bill Providing for Health Care Reform, U.S. Senate Committee on Fin., 11th Cong., 213 (2009) (statement of Jay Rockefeller, Senator of W.V.). State legislation again forcing consumers to purchase private insurance is hardly an “impediment” to insurer excesses.