



Fighting Legal Challenges to Health Care Reform

(Updated June 8, 2010)

National health care reform is under attack by opponents who contend that the new law is unconstitutional and illegal. These attacks lack legal merit and appear to be driven by a political agenda to derail reform. Lawmakers in at least 39 states have proposed referendums, laws and state constitutional amendments that would block key parts of national health reform, including the requirement that everyone who can afford insurance must obtain it. Three states have passed laws (Idaho, Utah, and Virginia) and two state legislatures have approved constitutional amendment ballot questions (Arizona and Florida) which will appear on November ballots. The first popular vote on health care reform will occur in August in Missouri, on a state law banning enforcement of the individual coverage requirement. In Oklahoma and Georgia, similar statutes have been approved by the legislature.

In addition, 20 states along with the National Federation of Independent Business (NFIB) and two individuals have jointly filed suit against the federal government to stop reform. Virginia filed suit independently against the federal government, asserting that the requirement for citizens to purchase health insurance is unconstitutional. Numerous other groups across the country have filed suit, alleging that the health reform law is unconstitutional.

This brief describes the challenges to health care reform and the political context. Additionally, it provides both legal and advocacy responses.

State Challenges to an Individual Mandate and Federal Authority

The national health care reform bill signed into law by President Obama on March 23, 2010, contains an individual mandate, or a requirement that every individual obtain health insurance unless they meet criteria for an exemption. The law also imposes fines for non-compliance. In addition, it includes a major expansion of the Medicaid program, which provides coverage for millions of low-income people and is jointly funded by the states and the federal government.

Legislators in at least 39 states have filed resolutions, constitutional amendments or legislation challenging reform provisions. Most of the constitutional amendments and legislative proposals prohibit compelling any person or employer to “participate in any health care system” and bar fines. Most assert a right to pay for health services directly, rather than through insurance. Some take a different tack, such as requiring the state to report to the legislature before implementing any provision of reform.

So far in 2010, bills or proposed constitutional amendments have been rejected or have failed to pass in 20 states (Alabama, Alaska, Arkansas, Colorado, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, New Mexico, South Dakota, Washington, West Virginia, Wisconsin, and Wyoming).

Statutes challenging reform

Three states have passed laws challenging national reform. Virginia and Idaho laws prohibit the requirement that individuals and employers purchase health insurance and eliminate any associated penalties. The impact of the laws is unclear because the requirement to purchase insurance does not go into effect until 2014.

Alternatively, Utah requires state agencies to report to the legislature prior to implementing any of the new law's provisions. Utah's law could impede implementation of some aspects of health reform. However, numerous provisions have federal safeguards if states do not act – for example, if states fail to set up a high-risk pool for persons with pre-existing conditions, the federal government will do it for them. Similarly, if a state fails to establish an insurance exchange, the federal government will intervene.

States actively pursuing statutes include Tennessee and Alabama where bills have passed through one chamber of the legislature. The Georgia and Oklahoma legislatures have both passed statutes. In Georgia, the statute is awaiting final gubernatorial action by early June. In Oklahoma, the governor vetoed the statute. In response, the Oklahoma house overrode the governor and is awaiting senate action. In Missouri, a statute passed the legislature but requires ballot approval in August 2010. This will be the country's first ballot vote on national health care reform.

Constitutional amendments challenging reform

Constitutional amendments were passed by legislatures in Arizona and Florida and will appear on November ballots in these states. In 2008, Arizona voters narrowly rejected a similar constitutional amendment. Constitutional amendment resolutions have advanced through initial steps in Louisiana and are pending in other states.

If passed by voters, these constitutional amendments would set the stage for a legal confrontation with the federal government, which would likely be resolved in federal court. Opponents of the amendment could request that the court prevent the amendment from going into effect until the constitutional questions are resolved. This type of injunction, if granted by the court, would ensure that implementation of health care reform provisions could proceed without delay.

All of the proposed [constitutional amendments](#) are modeled after the [American Legislative Exchange Council's \(ALEC\) Freedom of Choice in Health Care Act](#), which states that individuals may choose *not* to purchase health insurance and *cannot* be penalized for opting not to have insurance. ALEC is a non-profit think tank that supports a libertarian agenda. Numerous pharmaceutical companies and health insurers are represented on ALEC's private enterprise board and ALEC maintains that insurer lobbyists play a role in promoting model language to state legislators.

Lawsuits challenging reform

Attorneys general or governors in 20 states, the National Federation of Independent Business (NFIB) and two individuals have jointly filed [suit](#) against national reform, asserting the federal government does not have the authority require everyone to obtain insurance, and the expansion of the Medicaid program to low-income people places an unreasonable financial burden on states (See chart below).¹ Florida Attorney General Bill McCollum filed the joint lawsuit on April 14, 2010 in US District Court in northern Florida.

Virginia Attorney General **Kenneth T. Cuccinelli II** filed a [complaint](#) independently that maintains the federal law violates states' rights – more specifically it tramples on a newly passed Virginia law.

Other groups have filed suit against the federal government including the Thomas More Law Center in Michigan, New Jersey Physicians, Inc., and the United States Citizens Association of Ohio. Many of these legal arguments against national health reform mirror those of Virginia and the Florida-led suit. A full listing of all complaints and proceedings may be found [here](#).

State Challenges

Lawsuit led by Attorney General Bill McCollum (FL)	Announced Plans to File Legislation	Constitutional Amendment, Statute or Resolution Filed in 2009 or 2010	Passed Law or Ballot Measure
Alabama, Alaska, Arizona*, Colorado, Florida, Georgia*, Idaho, Indiana, Louisiana, Michigan, Mississippi, Nebraska, Nevada*, North Dakota, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington National Federation of Independent Business (NFIB) 2 Individuals (Florida resident and Washington state resident) Filed separately: Virginia * Governor initiated	Montana, Texas and Rhode Island	Alabama, Alaska, Arkansas, California, Colorado, Delaware, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, Nevada, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Washington, Wisconsin, West Virginia and Wyoming	Ballot Measures: Arizona, Florida, Missouri Laws: Idaho, Utah and Virginia

Source: [National Conference of State Legislators](#), last updated May 27, 2010, and Community Catalyst research.

¹ http://www.nytimes.com/aponline/2010/03/23/us/AP-US-Health-Overhaul-Lawsuit.html?_r=1&scp=9&sq=attorneys%20general%20health%20reform&st=cse

Political Context

Many of the sponsors of constitutional amendments and legislative proposals are Republicans who are running for a higher office against Democratic incumbents, or are running for re-election, and are using these challenges as a major plank in their campaigns. A number of the campaigns involve high-profile races for governor or other statewide office, bringing more attention to the legal challenges.

Health industry funding may also be playing a role in some of the initiatives. Many politicians pursuing legal challenges receive substantial funds from the health industry. [The Money in State Politics Institute](#) recently reported that over the last six years, the health industry donated over \$394 million to officeholders, ballot measures and political parties. In Florida, for [example](#), all 42 Republican co-sponsors of a constitutional amendment to ban the implementation of federal health care reform were recipients of large campaign contributions from the health industry, totaling over \$750,000 in 2008.

Similarly, there is a high level of partisanship surrounding the lawsuits brought against health reform. All the attorneys general who filed suit are Republicans with the exception of Louisiana. At least four attorneys general are running for governor or some higher political office. In some states there is disagreement between the governor and the attorney general regarding how to respond to reform. For example, four Democratic governors (Colorado, Michigan, Pennsylvania and Washington) signed a [letter](#) to the US attorney general supporting health care reform and opposing the lawsuit filed by their state attorneys general. In Georgia, the Democratic attorney general, refused to sign-on to the joint lawsuit so the Republican governor, Sonny Perdue, hired a special attorney general and joined the lawsuit. Additionally, the Georgia legislature considered impeaching their attorney general. Governors in Arizona and Nevada filed suit in lieu of their state attorneys general.

Democratic attorneys general are also speaking out against the suits. Kentucky's Attorney General Jack Conway offered his response, "I will not waste taxpayer dollars on a political stunt."² Arkansas Attorney General Dustin McDaniel cited past failures (*Brown v. Board, 1954*) in testing federal authority and said he is steering his state away from what he called frivolous litigation, "State budgets are tight enough right now without bringing actions that are entirely driven by political motivation rather than sound legal justification."³

² <http://wonkroom.thinkprogress.org/2010/03/24/state-lawsuit-serious/>

³ <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/29/AR2010032903590.html?hpid=topnews>

Legal Arguments Challenging an Individual Mandate

The basic legal argument being used against the individual mandate is that the requirement infringes upon states' rights; specifically Congress is overextending its powers to regulate, tax and spend. In summary:

- Congress is over-reaching its regulatory powers under the Commerce Clause. Congress is trying to regulate an individual's doing nothing (not purchasing health insurance), therefore regulating *inactivity*, not economic activity.
- By imposing a penalty for not having insurance, Congress is abusing the Taxing and Spending Clause. This "tax" on individuals violates a constitutional rule that requires this type of personal tax to be the same for every person in the country.
- Congress, by mandating insurance, is violating states' rights and preventing states from governing in the best interest of their residents. The federal government may only exercise powers granted to it by the Constitution; all else is left to the states. Mandating health insurance is not listed in the Constitution.

Further legal analysis may be found [here](#).

Relevant Constitutional Law

1. Commerce Clause. Congress has the power to regulate interstate economic activity.
2. Taxing and Spending Power. Congress has the power to collect taxes and spend for the "general welfare of the United States."
3. 10th Amendment or States' Rights. The Constitution prohibits Congress from requiring states to implement federal laws that interfere with states, rights.

Legal Arguments Supporting an Individual Mandate

While the scale of current health care reform is unprecedented, the congressional powers to regulate, tax and spend are well founded and have been broadly interpreted by the courts. Congress has exercised these powers to provide health insurance through Medicare and to fund it through a mandated payroll tax. In summary:

- Congressional authority to mandate the purchase of health insurance is within the broad regulatory powers provided by the Commerce Clause. The individual mandate affects interstate commerce because with more people insured, premiums could go down. Also, many insurance companies operate in a regional marketplace across states.
- Congress has the power to tax and spend in order to improve general welfare. Taxing power may only be limited if it infringes on the rights of the individual; there is no fundamental right to be uninsured. Expanding coverage to millions of Americans will improve the health of the nation, including helping to stop the spread of communicable diseases.
- States' rights are not violated by the individual mandate. Congress has the power to make laws necessary to protect people. An individual mandate is necessary spread the cost of health care across both healthy and unhealthy individuals. The mandate prevents people from only buying health insurance when they need it. Finally, the federal government is not

forcing states to implement a federal program – it is using other means to encourage state participation, including offering Medicaid matching funds.

Further legal analysis may be found [here](#).

Justice Department Response

In federal district court in Detroit, the Justice Department responded to a lawsuit filed by the Thomas More Law Center in Ann Arbor, Michigan. Similar to the Attorneys General-led lawsuit, the conservative non-profit group claims that the individual mandate is unconstitutional and is seeking an injunction. The brief serves as a preview of the argument the government will present in response to the Florida-based challenge and others surfacing around the country. The main points of the brief are as follows:

- An individual or group cannot claim injury prior to April 2015 when the IRS imposes penalties associated with the individual mandate. Claiming injury is speculative and premature.
- Individuals are engaged in the health care market whether they purchase insurance or not; an individual's economic choice *not* to purchase health insurance has a national impact because many of their health care costs are transferred to providers, insurers, government and insured individuals.
- The individual mandate is necessary to the financial stability of the entire health care system. Otherwise, people will not purchase insurance until they need it, so the number of sick people with insurance will far out number healthy ones, increasing overall cost and harming the general welfare.
- Congress has the right to tax and spend for the general welfare.
- It is in the public interest to repair the health care system to meet the needs of everyone. The shortcomings of the status quo cannot be ignored – shorter life spans, lack of financial security for families, and spiraling health care costs that encumber the entire economy.

The Justice Department's defense in the Virginia lawsuit mirrors the Michigan brief with some minor additions. Virginia's case differs slightly in that it adds the constitutional issue of states' rights to the list of complaints. The Justice Department argues that:

- Virginia has no legal standing to exempt its citizens from federal law. First, the individual mandate does not impose any obligations on Virginia or threaten its interests because it is enforced by the IRS, a federal entity. Second, a state may not manufacture legal standing by passing laws counter to federal law. A state may not abstain from federal laws or interfere in the enforcement of them. National health reform was legitimately enacted through a democratic process inclusive of Virginia's representatives to Congress.

The federal response to the Attorneys General-led lawsuit is due in mid-June. It is expected to follow the same roadmap as Michigan and Virginia.

Current State of Defense

The National Health Law Program (NHeLP) is spearheading a legal team in support of health care reform, which is monitoring all legal challenges and consulting with the Justice Department. NHeLP is maintaining an informational [web page](#) that catalogues all legal proceedings and information related to the suits. NHeLP and others are also analyzing state legislation and formulating appropriate legal responses to the challenges in an effort to prevent bad precedent in states.

Advocates are also defending health reform in a variety of ways. In Florida, advocates ran a “Not in our name. Not on our dime” campaign, presenting a [petition](#) to the attorney general’s office in opposition to Floridian tax dollars being used to fund a lawsuit against health reform. Colorado advocates are challenging the scope of the ballot initiative, arguing that too many issues are presented to voters for a single up or down vote in November. In numerous other states, advocates are testifying in their state legislatures about the benefits of reform and the potential lives placed at risk from delaying implementation through legislative challenges.

Human Cost of Legal Challenges

There is a human cost to the legal challenges. By delaying health reform implementation through legal tactics, health care is postponed and access is restricted for millions of Americans. For example, national health care reform will increase access to affordable health insurance for 30 percent of South Carolinians under the age of 65 – similarly it extends coverage to 30 percent of Idahoans, 29 percent of Floridians, and 28 percent of Texans, to name a few. Americans in every state will benefit from national health reform through expanded coverage options. Without reform, health care costs will continue to rise faster than wages, harming the nation’s most vulnerable people.

What Can Advocates Do?

Talking Points

- While every individual has a right to question federal policies, the motivation for these legal challenges appears to be derailing reform and maintaining the status quo. Health care reform will address the problems in our health care system, including growing numbers of uninsured and underinsured people, denials of care and exclusions from coverage because of pre-existing conditions.
- The challenges appear to rest on weak legal ground. The federal courts have consistently upheld the power of Congress to regulate, tax and spend. These powers underlie the major provisions of health care reform. Health care reform is in the best interests of the nation, and will provide health security for millions of people.
- Many states have not adopted widespread health care reforms and are not likely to pursue them in the near future. Standing in the way of reform would deny millions of people access to quality, affordable health care.

- Health care reform will bring jobs and money to the state and local economy. It will also bring coverage, through the Medicaid program and federal subsidies, to hard-working people who are without health insurance.
- Making health care decisions through the courts is not good medicine.

Organizing

- Activate coalitions of supporters, including a range of stakeholders, to rally in support of reform.
- Use petitions to demonstrate support for health reform and opposition to legal challenges. Recruit lawmakers, businesses and other stakeholders to sign. Send copies to attorneys general, governors, and state representatives, as well as media. [Florida](#) serves as a useful example.
- Encourage governors to sign a [letter](#) in support of health reform similar to that from Colorado, Michigan, Pennsylvania, and Washington.
- Solicit support for a pro-reform resolution in the state legislature that affirms health reform and all its benefits.
- Support elected officials and candidates who oppose legal challenges.
- Recruit constitutional specialists to testify to the legislature about the constitutionality of the individual mandate and exchanges.
- Hold local forums to discuss health reform with communities, spotlighting community members who would benefit from reform such as seniors, small businesses and children with pre-existing conditions.
- Recruit health care insiders – such as provider, hospital and insurer allies – to help speak out in support of reform and against constitutional and legislative challenges.
- Submit Freedom of Information requests to state officials to uncover how much the lawsuits are costing taxpayers.
- Coordinate strategy with advocates from other states and national organizations through Community Catalyst and other national groups.

Resources

Tools

- Ballot Initiative Strategy Center tracks ballot initiatives nationally
www.ballot.org/pages/health_care
- Progressive States Network tracks ALEC legislation and health reform implementation nationally
<http://www.progressivestates.org/node/24917>
- National Conference of State Legislatures tracks state legislation regarding legal challenge:
<http://www.ncsl.org/default.aspx?tabid=18906>
- National Health Law Program (NHeLP) tracks all legal actions regarding health reform (briefs, complaints and other pleadings)
http://www.healthlaw.org/index.php?option=com_content&view=article&id=457%3Ahealth-reform-litigation&catid=42&Itemid=212
- State calculator to estimate job growth due to increased Medicaid spending
<http://www.familiesusa.org/issues/medicaid/other/medicaid-calculator/medicaid-calculator-states-map.html>
- Community Catalyst's Medicaid defense toolkit
http://www.communitycatalyst.org/resources/defending_medicaid/

Reports

- Center on Budget Policy Priorities legal brief outlining arguments
<http://www.cbpp.org/cms/index.cfm?fa=view&id=3148>
- Center on Budget Policy Priorities brief on state costs for expanding Medicaid
<http://www.cbpp.org/cms/index.cfm?fa=view&id=3161>
- Center for American Progress report on the human costs of court challenges
http://www.americanprogress.org/issues/2010/03/unraveling_health.html
- Report on projected job growth as a result of health reform
http://www.americanprogress.org/issues/2010/01/pdf/health_care_jobs.pdf
- The state-by-state cost of doing nothing about the health care crisis
http://www.newamerica.net/publications/policy/cost_doing_nothing
- Estimate of state economic gains from Medicaid expansions in reform bills
<http://www.rchnfoundation.org/images/FE/chain207siteType8/site176/client/Medicaid.pdf>
- Why We Need the Individual Mandate. Memo by Jonathan Gruber
http://www.americanprogress.org/issues/2010/04/individual_mandate.html
- New England Journal of Medicine addresses the legal challenges brought by attorneys general
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<http://thehill.com/blogs/blog-briefing-room/news/73975-state-ags-request-reid-pelosi-drop-nebraska-medicaid-funds-from-health-bill>

NHeLP site Lists all complaints together on their website
http://www.healthlaw.org/index.php?option=com_content&view=article&id=457%3Ahealth-reform-litigation&catid=51&Itemid=212