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**Policy and Political Implications of the Supreme Court Case on
the Affordable Care Act
Kaiser Family Foundation
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DREW ALTMAN: I recognize a lot of familiar faces, you know me. I always try to lighten the mood when he have a morning event here but, in a Supreme case - in a Supreme Court case it's a serious thing and it's a formal thing. I almost feel like we should be doing this event in robes. In you case you can't envision just how impressive that would be [laughter], we don't have Chris here do we?

This is the only slide that will not be available to you after this briefing except for the picture of Chris Jennings since he's not here, I'll make that widely available.

Okay let's get to work. There are two potential game changers on the horizon for the ACA, the Supreme Court case and of course, the election but the Court case comes first. So what we've done is we have assembled ourselves today to do the best briefing we could on the issues that are in the case, how the Court might approach the case and what the policy and political implications of the different outcomes might be.

And basically we're going to divide this into three parts; the legal issues and the Court, that's part one. The policy implications which we hope to really focus on today. And as best we can, the political implications for the President and the Administration, for the Congress and how the

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American people might react to possible outcomes from the Court. That's our game plan for today.

I'm sure you know everybody on the panel today except possibly our secret weapon MaryBeth so let me start with that. MaryBeth Musumeci, by the end of today you all have to be able to say and pronounce and spell Musumeci. As an attorney on our staff from a small law school in Cambridge Massachusetts, where I'm from, who has written a really excellent brief in your packets, I hope you all have on the case. And she is going to summarize how this got to the Supreme Court, what the issues are in the case, the different action the Court might take.

So she has a special dispensation today with regard to time because she has to cover a fair amount of territory for you. Joe Onk is I will say an institution to many of us in this town. Now, with the Raben Group he was in the - and there is Chris - I need to go back and just show Chris [laughter] there he is yes. His picture and only his again, will be available after the - Joe was in the Carter White House including his deputy counsel when Diane and I - I will just say very, very young working in HHS I'm quite sure he had no clue that I was there. And he has been a very prominent attorney in the private sector and in the public sector and on Capitol Hill in D.C. Most recently of course, as Senior Counsel to Nancy

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Pelosi and of relevance to today's discussion, Clerk to Justice Brennan.

And I know that Joe will have the insights into everything that we're going to discuss today which I very much welcome. Larry Levitt is going to talk about what invalidating or conversely upholding the mandate would mean for the ACA and Diane about the Medicaid expansion and especially what eliminating the Medicaid expansion would mean for the ACA, but also more broadly for federal-state relations. And you all know Diane and you know Larry and you also know Chris Jennings and you know Sheila Burke.

Except you're going to have to imagine and envision Sheila Burke, she will be will us just in few minutes I think. And both are very, very close friends of the Foundation and have been with us and I think with you in this room many times before. And they are going to talk about the President and the Administration and the Congress could respond to different outcomes from the Court.

And Mollyann Brodie is a very familiar face to most of you in this in room and certainly her Kaiser polls are familiar to all of you. She is our Pollster in Chief, except I just made that title up, it's not an actual title at the Foundation. And she will talk what we know about public option and the mandate and what to look for in terms of the public react to

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the Court's decision. And also highlight just a few findings from our new tracking poll, which not coincidentally I think is out just about five minutes ago.

I hope this is not disappointing to you or any kind of a surprise, but before we start I should say that no one of course, knows what the Court will do. There are those who - I hope you didn't come for that, there are - there are those - no we have secret inside information I'm going to reveal to you today what the Court will do.

There are those who will predict that the Court will uphold both provisions, those who will predict that it will throw them out. Some who think it will invalidate the entire law, I don't know too many. Some who think the Chief Justice will not want to get involved in such an intensely political issue in an election year especially if the vote is close and will punt to 2014 or some other time. And to this others say why would the Court hold three days of hearings and not make a decision? So you can hear virtually any prediction you want around town and around the country.

I think that predicting what the Court will do is just much tougher than laying out the potential policy and political consequences of actions the Court might take. Not that is all that easy, which is one thing we hope to do today. There are a

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series of obvious questions and questions that we hope to address. I'll tick off just a few and then we'll get started.

Will an adverse decision in the Court activate the Left in an election year? As we all know the Right - the intensity on the ACA has been more on the political Right. If the Court upholds the law, will it create a calmer environment for implementation in the states and for implementation generally? But will it also ignite the Right feeling that they have no recourse but to repeal the law?

What would a non-decision by the Court - putting off a decision mean? I think that's a really complex one to think through so we'll ask Chris to answer that question. What happens if the law has to go back to the Congress to replace the mandate with some other solution? That's also a tricky one to think through.

How will the general public react to a decision? A public that is dug in on the law sharply divided along partisan lines? And our polling shows - believes the Court is at least as driven by ideology as by it's focus on interpretation of the law.

And most important of all I think, and a focus for today; what would overturning the mandate or the Medicaid expansion or both, actually mean for the law, for the ACA and for the American people?

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So there are many more questions, but these are among the questions that we will try and get into today and others will be raising. You will raise some as well. So let's start at the beginning with MaryBeth and then with Joe and then I will pass this along to you and we will get going.

MARYBETH MUSUMECI: Good morning. The case before the Supreme Court is known as Florida versus HHS. There are actually two groups of plaintiffs in the case. The one case was filed by the state of Florida and it's joined by 25 other states, then we also have a second group of plaintiffs led by the National Federation of Independent Businesses joined by some of their individual members.

Both groups of plaintiffs are suing the three main federal agencies charged with implementing the ACA: the U.S. Departments of Health and Human Services, Treasury and Labor. This case has moved incredibly quickly for federal litigation. So the Florida case was filed on the same day that the President signed the ACA in March of 2010 and nearly two years to the day later we have oral arguments scheduled in the Supreme Court, with a decision expected by the close of the term this June.

The Florida case is among about 26 other cases that were filed across the country in federal courts. Of those cases only two have struck the mandate down on its merits, the

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others have not. Similarly only one of those cases ruled on the Medicaid expansion and the Medicaid expansion was upheld. Of the cases in the - in the lower courts, we have some that went up to the Federal Appeals Courts, seven appeals courts have ruled on the ACA. And again, from those decisions one struck the mandate, the rest did not. And similarly one upheld the Medicaid expansion that the rest did not rule on the Medicaid expansion issue.

So from those seven federal appeals courts we have Florida versus HHS accepted by the Supreme Court with some of the other cases still pending.

This gives you a sense of the positions that the states are taking in the litigation. The states in the dark blue are the group with Florida who are challenging both the constitutionality of the individual mandate and the constitutionality of the ACA's Medicaid Expansion.

The states in orange have filed an amicus brief at the Supreme Court supporting the ACA. We have the two states in the middle blue actually have taken positions on both sides of the case. So for example we have a governor on one side and the state attorney general on the opposite.

The Supreme Court has decided to hear four issues related to the ACA. The first concern the individual mandate, and then the fourth issue separate and apart from that is the

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Medicaid expansion. And we're going to spend the remainder of the presentation going through those issues.

So the first issue is this the proper time for the Court to make a decision on the mandate, involves part of the Internal Revenue Code called the Anti-Injunction Act. The Anti-Injunction Act is a law that prevents pre-enforcement challenges to taxes. So essentially you can not challenge the validity of a tax in court until that tax comes due and you're assessed it.

So you would have to either pay your tax and then sue to seek a refund, arguing that the tax is invalid. Or you would have to have the tax come due, refuse to pay it and then when enforcement proceedings are initiated against you then raise you arguments about the invalidity of the tax.

So for ACA purposes, if the shared responsibility payment, the penalty that's - financially, that's associated with failure to comply with the mandate. If that is considered a tax within the meaning of the Anti-Injunction Act, courts do not have jurisdiction to decide the case until some time after the spring of 2015 when 2014 tax returns are due. Because the way the law's administered the penalty is reported on and paid on federal tax returns.

So the federal government along with the private plaintiffs and the state plaintiffs all are now taking the

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position that the Anti-Injunction Act does not apply and the Court should decide the case now. However, the Anti-Injunction Act is jurisdictional, meaning that court - it removes power from the courts to decide the case, it can't be waived by the parties. For that the Court has appointed an outside amicus to take the position that the Fourth Circuit Court of Appeals took when it ruled on the ACA. That the Anti-Injunction Act does apply and that the case cannot be decided now.

Assuming that the mandate clears the Anti-Injunction Act hurdle, the Court will reach the second issue which is whether the mandate is constitutional. There are three separate constitutional provisions that the Federal Government is asserting as supporting the Anti-Injunction Act, but the main one in play in the Commerce Clause. Essentially the Supreme Court has held - basically since the new deal, that Congress has the ability to regulate anything that is in the stream of interstate commerce or that substantially affects interstate commerce. And that's what Congress reasonably believes to be the case.

So the Federal Government is arguing that the health care market is different than many other markets. That everyone or nearly everyone will need health insurance at some point. And that the costs are high and unpredictable and therefore to make the market work well and to avoid having high

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costs that people cannot fully self-pay, the mandate is required.

In response to that, the State plaintiffs and the private plaintiffs say that this is not about regulating commerce at all. It's about regulating economic inactivity as opposed to activity that the mandate is forcing people who would otherwise choose to not enter the market to actually do so.

If the court decides that the mandate is constitutional it will take effect in 2014 unless Congress subsequently acts. However, if the Court decides that the mandate is unconstitutional, it will move on to determine whether it is severable from the rest of the law. This means that the Court will have to determine whether the rest of the law can function without the mandate provision and whether Congress would have passed the law if it knew that it could not - that the mandate would not survive.

If the Court decides that the mandate is not severable, the entire ACA will be invalidated. This is what happened in the Federal District Court in Florida and this is the position that the private plaintiffs and the state plaintiffs are taking in the Supreme Court. If the Court decides that the mandate is severable it could just invalidate the mandate and allow the rest of the law to stand.

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This is the result that the Eleventh Circuit Court of Appeals reached in the Florida case. And because none of the parties are taking this position in the Supreme Court, this is the second instance in which the Court has appointed a third party amicus to argue that position before the Court.

If the Court decides that that mandate is severable, the other option is to strike the Guaranteed Issue and Community Rating Provisions of the ACA. And this is the position that the Federal Government is asserting in the Supreme Court.

Separate and apart from the first three issues, the Court is also going to rule on the Medicaid expansion. The ACA expands Medicaid eligibility to nearly all non-disabled elderly adults up to 133 percent of the federal poverty level. Along with that expansion and eligibility, the ACA also provides a significant enhanced federal medical assistance matching rates for - I'm sorry, for 100 percent for years 2014 to 2016 and then gradually decreasing to 90 percent thereafter by 2020.

If the Court decides the Medicaid expansion is constitutional, it will effect unless Congress subsequently acts. The constitutional provision at issue here is the spending clause. The argument is that Congress - whether Congress has the authority to condition the grants that it's

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making to states. The Federal Government's position is that this is consistent with Congress's broad authority to do so.

The state petitioners however argue that this is coercive of the states. That is essentially an offer that they can't refuse because of the size of the Medicaid program, and that therefore do not have a real choice about whether or not to comply with the terms of expanding Medicaid eligibility, because they've become so dependant upon federal Medicaid funding.

If the Medicaid expansion is struck down, this is really the question that's the largest issue of speculation here. Technically the Court did not grant cert on whether the Medicaid Act is severable or not, unlike it's grant of cert to consider the severability of the mandate. So it's really an open question as to what the Court will do if the Medicaid expansion is struck down.

However, applying the traditional severability analysis; if the Court decides that the Medicaid expansion is not severable it will invalid the entire law. This will include the mandate along with all the other provisions. If the Court decides that the Medicaid expansion is severable, it could strike just the Medicaid expansion or the Medicaid expansion along with some other provisions of the law.

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And so this last slide gives you a sense of what's at stake in the Court. The ACA has a number of provisions including the mandate, the Medicaid expansion and many other provisions, some of which have already taken effect. And the rest of the panel will speak about some of the implications.

DREW ALTMAN: Great. So that's how it got to the Court, the legal questions before the Court, the actions of the Court might take. Joe, your perspective on the issues in the court.

JOE ONEK: I believe that despite the fact that this case has had almost unprecedented public and scholarly attention, probably very few cases in which there's been such sustained attention on a challenge to a statute. You know, maybe I'll have to go back to the new deal cases; Brown versus Board of Education, this is extraordinary.

This panel as you know, is just of one many in Washington and all over the country, and the arguments haven't even begun yet. But I think in the end it may turn out to be an anti-climax, because the arguments challenging the statute are flimsy to frivolous. And we can go into the details of all of them later but I want to do broader picture.

In my view, this case is a little like Seinfeld, it's about nothing. [Laughter] you say how can it be about nothing? Isn't this about the reach and role of the Federal Government?

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No. No one seriously denies that the Federal Government can create a national health insurance program. Indeed we already have one, it's called Medicare. We have a national insurance program for the elderly.

Congress could have - and there are many people probably in this audience and on this table who suggested it, they could have simply extended that to everyone. That's clearly constitutional. Congress clearly could have done the so-called mandate through the taxing power. That would clearly be constitutional. The fact that it happened to choose the Commerce Clause is in my view, and we can discuss it later, a distinction without a difference.

But in any event there's no question. The big questions, there are questions about things the Federal Government can do, there's no question that the Federal Government can do this. What about liberty? Is this some big liberty question? You know, we've had great debates in this country recently with respect to Guantanamo detainees and other - this case isn't about liberty, although some people say so.

First of all, there is no liberty interest in forcing other people to pay your medical bills, that's just nonsense. Governor Romney by the way, put that as eloquently as anybody when he signed the Massachusetts law. What's the liberty interest?

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Secondly, nobody here is required to do anything, they either buy insurance or they pay a penalty like a tax. Well everybody already pays a Medicare tax, everybody in this country pays a Medicare tax whether they choose to use Medicare or not. I notice by the way, that Governor Romney just turned 65 and very publicly said he wasn't going to do Medicare, he was going to rely on his private insurance, that's fine. But he's been paying the tax, and he's going to keep paying the tax. Is his liberty infringed?

Thirdly, as everybody knows, the states are perfectly free to do the mandate. Massachusetts has done it, any state could do it. Well what's the liberty interest if any state can impose a mandate on somebody? That's not the kind of thing you call a - so it's not about liberty, there's no big issue. And this Medicaid expansion issue, the so-called coercion issue is not only ridiculous legally, we can get into it. But on a factual basis, the states make out like bandits on this because not only do all the new coverages they get between 90 and 100 percent paid for, a 100 percent at the beginning and then 90 percent of all the new coverage.

But they save billions of dollars because all the free care they now have to give through a wide variety of clinics,

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hospitals and other programs will now be paid for by the federal tax payer. So they come out like bandits.

Second of all, the whole predicate of their argument is that somehow if they don't accept this the Federal Government will take away all their Medicaid money, that's their argument. I don't think that's legally relevant, but where is that written? Where is it said what the Federal Government will do in 2017? Will the Federal Government really take away all their - supposing it just takes away a little? Or takes away their administrative costs or does something else to incentivize them to accept the program?

So on a factual basis, the argument makes absolutely no sense. So if I'm right about this, if this is all frivolous arguments why all the concern? Why all the fuss? And I can give you the answer to that in three ominous words; Bush versus Gore. In that case the Supreme Court acted in such a blatantly political and unprincipled way that many people including close scholars of the Court are uncertain about what the results in this case will be. They are worried that there will be five votes on this Court which will simply take whatever political and policy views they wish to take, partisan or otherwise, and ignore all the legal arguments which make this frivolous.

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And I think, although I understand the ominousness of Bush v Gore, I think that doesn't really make sense. Bush v Gore was unique in many respects, but one in particular; it didn't establish any new precedent. Indeed the Court basically said we're deciding this case now for this purpose, you can never cite it for anything. That's what the Court says, many of you have read it.

It says you can't use it for anything, you can't cite it, it's [inaudible] just forget about it, George Bush is President, goodbye [laughter].

Now that was very consequential, I don't mean to suggest that wasn't important but it had no impact on the law. This is very different. There is no way that the Supreme Court can strike down the mandate or accept the Medicaid expansion without doing incredible damage to the entire structure of constitutional law, they would have to repeal basically all the Supreme Court decisions in the new deal era. So they go beyond - way beyond that. They would have to basically overrule Justice Marshall's decision on the necessary and proper clause in McCulloch versus Maryland 1819.

So you're talking about basically reversing 200 hundred years. They can't do that, they won't do that. There's only one person who might do it because he certainly doesn't even -

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doesn't agree with the New Deal Decisions and may not agree McCulloch, and that's Justice Thomas.

There is - I don't see how any other justice quite frankly, could possibly rule in favor of any of these arguments. Now having said that, there is one argument that isn't so frivolous and that is the Anti-Injunction Act argument. That is a highly technical, statutory argument. I think the better of the argument is that the case should be able to go ahead. Judge Silverman, conservative Republican judge made that argument as did others here.

Among other things, if you have this close case statutorily there are at least two good reasons, if it's very close, to come out the way the Federal Government wants. First of all, this statute - its purpose is of course to defend the Federal Government. It's to prevent people from suing early on and interfering with the collection of revenues by the Federal Government. If the Federal Government says we don't think the case applies, that carries some weight.

And then obviously from a public interest perspective, it's clearly better that this case get resolved earlier rather than later. Other people on the panel will discuss the consequences if the case is in limbo and states you know, engage in civil disobedience and don't set up exchanges, et cetera, et cetera.

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So I think on balance, the better argument is that the case should be decided now. If I had to guess, I think that the Court will in fact hear the case, it will be upheld and it won't just be five-four. Roberts I think will clearly be on the right side not only because of his intuitional interests as Chief Justice but also because in a variety of other cases; Comstac and other, he hasn't bought into the sort of federalism, states rights doctrine that various times some of his other conservative colleagues have.

So I think as I say, the case is about nothing and you will an anti-climactic decision in the sense that I think the Court will overwhelmingly decide in that favor. If they don't, that is, if they delay the case, it will be interesting to see what the response is. Congress could very quickly if it wished, pass a one line amendment to the Anti-Injunction Act saying the Anti-Injunction Act doesn't apply here. Nothing stops Congress from doing that.

Whether it would do that or not, I don't know, we could think about the politics of that. If they did then the case would presumably be reargued again in a few months but you would of course, have gotten past the election which might be the goal of some of the people.

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You know, in the - and my last one, in the Court of Appeals here, Judge Cavanaugh, very conservative judge, he did refuse to decide the issues and decided the Anti-Injunction Act issue. But of course Judge Cavanaugh is running for the Supreme Court, and it was clearly in his interests as any other conservative justice, not to decide this issue one way or the other and alienate one side or the other.

But you know, the guys hearing the case they're actually - they're already on the Supreme Court you know, they can make - decide the issue. My guess is in the end they will and will decide as I've said. Thank you.

DREW ALTMAN: That is what you call a clear perspective, thank you [laughter] thank you very much. What I want to do is get out all of the parts here; the policy, the political and then we want to open it up of course, so there will be time for that. Now we want to turn to the implications for the ACA, the American people of different possible outcomes. And we're going to start with Larry and the mandate and then we'll move seamlessly to Diane and Medicaid, so Larry.

LARRY LEVITT: Welcome to the non lawyer part of the - part of the morning and maybe this is more like the Office rather than Seinfeld, I don't know, I don't know what we're moving on to.

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But there are obviously many possible scenarios for a Supreme Court decision we certainly don't have time this morning to deal with all of them. And I'm going to look at one narrow, I mean the decision could be sweeping, it could be narrow, I'm going to look at one narrow possibility. Which is although consequential as Joe said which the Court strikes down the individual mandate but leave the rest of the law intact.

The Medicaid expansion, the insurance market reforms, the exchanges, tax subsidies for low and middle income people and so on and look at what might happen and what the policy responses might be. And just backing up remember the purpose of the individual mandate, many people have speculations about what the purpose is but as I see it the purpose to ensure that the insurance market reforms and the law work.

If you require insurers to take all comers regardless of pre-existing health conditions, sicker people will very likely enroll and enroll quickly but healthier people may hold off. The result is that premiums rise potentially by a lot, so the idea of the mandate is to get healthier people enrolled from the start.

Now putting aside politics for a moment at least, let me look at some of the potential policy responses to this. And again I'm going to focus relatively narrowly here. I mean you could imagine repealing and replacing the law, going left with

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a single payer system, going right with a deregulating much of the insurance market. But I'm going to look at sort of narrow responses that keep the rest of the ACA largely intact and the spirit of the ACA intact, but deal with the problem there is now; no mandate.

You know the first obvious response is to do nothing, just let things go ahead. Doing nothing obviously comes naturally to our political system these days. So you would keep the Medicaid expansion, insurance companies would be required to accept all comers, there would tax credits to low and middle income people to make insurance more affordable and health insurance exchanges. Either run by the states or by the Federal Government, but no mandate.

Now frankly no one knows what would happen here I mean, this is not an experiment that we've done before. So no one really knows exactly what happen if you - if you did nothing and let all these other pieces go into effect. I'd say the consensus that the direction of the change would be fewer people covered and premiums going higher. And the Congressional Budget Office kind of has the middle ground estimates here where they estimate that about 16 million more people would be uninsured without a mandate than with a mandate.

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And that premiums in the non-group individual market would go up by 15 to 20 percent, but there's a lot of uncertainty around these numbers. And if you ask any modeler who works on these issues, I think they would say that this is probably the most uncertain part of the analysis they're doing. And there are estimates out there that are much higher and estimates that are much lower.

And part of the uncertainty comes from differing estimates of how effective the mandate even is to begin with and therefore different estimates of what happens if you remove the mandate. And honestly the mandate isn't as strong as you might - as you might believe from some of the rhetoric and the - and the debate out there.

If you think about this, most people pretty much satisfy the mandate automatically, they're either getting employer or they're on Medicaid and the mandate really never enters into their life. The key is what happens to people who are uninsured or buying coverage on their own and how they behave.

Now, for the uninsured there are a number of exemptions from the mandate, undocumented immigrants who aren't eligible to enroll in exchanges are ineligible for the tax credits, people whose income is so low that they don't have to file taxes to begin with. That's about \$9,500 for a single, \$19,000

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for a married couple, and the biggest exemption which is that if health insurance is unaffordable to someone.

So if the cost of health insurance after the - any employer contributions, after tax credits, is more than eight percent of income. Now all told, when you add these up about 40 percent of the uninsured are actually exempt from the mandate based on these exemptions. And the penalty which is obviously ideologically an important issue and potentially legally, as an economic matter the penalty actually starts off quite modest.

In the first year of reform in 2014 the penalty which gets imposed the following year is just 95 dollars per adult, 47 dollars and 50 cents per child, up to 285 dollars per family or one percent of income, whichever is greater. So a fairly - a fairly modest penalty for the mandate to begin with.

So there's lots of uncertainty about how people would react to the mandate and therefore how they would react without a mandate. And it's a judgment call whether the estimates of how much premiums would rise, how many fewer people would be covered is acceptable or not.

So now related to doing nothing is the Federal Government still does nothing but states still have the authority to enact a mandate individually. A state could decide that the idea of a mandate is unacceptable and they're

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willing to take the risk of premiums going up, of the number of uninsured going up. Or they could decide they're willing to impose a mandate and try and stabilize the insurance market. So a state by state judgment of what they want to do with the rest of the law intact.

You could also replace the mandate with a tax. This would be I think, the simplest approach and the cleanest and most effective approach. Essentially enacting a tax on everyone and then allowing people to deduct their health insurance expenses from that tax or be waived out of the tax if they have health insurance.

Looks very similar to the mandate frankly, but I'm told by lawyers, comes under a different authority. Comes under the taxing authority of the Federal Government, rather than the Commerce Clause. I think you could structure a tax in a way that it would pass constitutional muster, the problem here is the - is the politics. This was certainly considered during the ACA debate and rejected because of the political optics of a tax being imposed on all Americans even if many don't have to pay it to begin with. So there's some difficulty I think in getting this through Congress.

Final approach to getting rid of the mandate would be essentially tweaking the consumer protections in the law. So this would - the idea - it's like loosening up the insurance

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market consumer protections allowing insurers to impose limited preexisting condition exclusions. Allowing them to impose limited surcharges on people if they - if they have health conditions, so it would essentially discourage people from waiting until they're sick before getting insured.

You could also expand high risk pools, much like is done in auto insurance today. So essentially segregate people who are sick and high cost from the rest of the insurance market, keep the rest of the insurance market stable. Now you - of course you'd have to pay for those high risk people somehow through assessments on employers and insurers, through taxes et cetera, which of course is difficult but theoretically possible.

You could also essentially take away the protections for people if they don't buy insurance promptly. So for example, if someone loses employer coverage, they go off Medicaid, you could say if you don't enroll then you could be charged higher premiums later, you might be ineligible for tax credits for some period of time. So again, the idea is to try and encourage people to enroll promptly into insurance.

Now all these alternatives are certainly messy in some ways, less clean than the mandate, but I don't think they're impossible, there are ways to do this without a mandate. The politics of course are even messier. All of these measures

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would require some kind of Congressional action. And I'll leave the prospects of that up to up to Sheila and Chris.

I just want to close, there's obviously other possibilities here, the big possibility is the Court upholds the mandate as Joe suggests. And there's certainly no particular policy response that's required there, the law goes into effect as anticipated. But there's certainly big implications for politics and how implementation of the law plays out. There are many states, potentially most states, that are kind of waiting on the sidelines now until the Supreme Court decides.

And before they decide what to do, what role they want to play in implementation, whether to set up exchanges. And I think once the Supreme Court - if the Supreme Court upheld the mandate, states would - many states would decide that they actually do want to play a role that they don't want to leave exchanges to the Federal Government. The challenge is that time starts to get short.

The Federal Government is going to be determining whether states are ready by January 1st, 2013. If a Supreme Court decision comes down some time this summer, that leaves only a few months for a state to really get going if they haven't been doing much yet. And it will be tough to pull off. I think what it does is it puts a lot more pressure on the idea

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of a partnership between states and the Federal Government, which is an approach that the Obama Administration has envisioned and talked about.

Where states would take on some responsibilities initially, the Federal Government would take on some responsibilities and particularly until a state is ready or willing to take on more. And I think that's the thing to watch if the Court goes that way.

DREW ALTMAN: Great, so we'll move on to Medicaid if we're not all frozen to death, it is cold in here I apologize for that, Diane.

DIANE ROWLAND: It's great to hear Drew say it's cold in here, that's not his usual remark [laughter] and it is. But I want to talk briefly about a program that's trivial or frivolous; the Medicaid program and the implications of this case for that program. Of course today some 70 million low income Americans and one in three American children count on Medicaid for health care coverage and for assistance with long-term care and other services. But it really is a program that reaches few adult and very limited coverage for childless adults.

So as MaryBeth noted what the ACA does is it makes Medicaid their primary vehicle for providing coverage to the lowest income people in the U.S. by providing coverage everyone

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under 133 percent of the Federal Poverty Level or roughly 25 thousand dollars for a family of three. So Medicaid has become a critical element in trying to put together the pieces to get us towards universal coverage.

And in fact that's because about half of the uninsured population would qualify for Medicaid coverage under the ACA because of their low incomes and the fact that most of our uninsured population is low income. As a result, it would put about 16 million new enrollees onto the Medicaid program in 2019 so there are coverages at stake and if we don't provide this coverage obviously we would see more in the growth of the uninsured population, and we would continue to see struggles to get health care access for the lowest income population.

But if these laws upheld the states as MaryBeth indicated, there is substantial federal funds to do this and they get some reimbursement for the services they now provide to the uninsured. So as Joe mentioned they actually make out - I don't know if I'd characterize it as bandits but they do do quite well in getting broader coverage for their low income population through the Medicaid program.

And it's also interesting that we're the largest numbers on uninsured especially low income uninsured live are in many of the states that MaryBeth showed you, that have in fact brought the suit forward. So the states where the

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population stands to gain the most from the ACA mandate are in fact many of those arguing against it.

Now if the expansion is upheld it's quite simple, this goes forward and we expand the Medicaid program, it's existing program we build on a strong Medicaid base and more people get coverage and Medicaid becomes a program that no longer provides coverage based on categories but solely on income. And there is a source of coverage for the lowest income population. But if for example, the expansion is not upheld and we really do change historic precedent about how coverage has been expanded through Medicaid over the last three decades, then the old rules would apply.

And we would be back to where very few adults would qualify for the Medicaid, most will be left uninsured. And just to remind you of the inequity today, children are covered on average under Medicaid and SCHIP at about 250 percent of the Federal Poverty Level. Childless adults are only covered if they get a waiver for services so that only eight states actually today have waivers to provide some kind of comprehensive Medicaid like benefits to the childless adults.

That means that if you're very, very poor you're not disabled and you're not a parent of a dependant child then you have no ability to get onto Medicaid and you probably are so

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poor that you're not being offered much coverage through the employer sector even if you're working.

Second, for the parents of these children, many states have very, very low income eligibility levels for those parents, on average 63 percent in the Federal Poverty Level. But in many states, in eight states - in 17 states the parent's eligibility is below 50 percent of the Federal Poverty Level. So there's a lot of adults who are parents with children who are at risk of not getting coverage if the expansion is not upheld.

And there are only eight states as I mentioned, that provide any coverage to childless adults who have very low income. So the first thing that happens if the expansion is overruled is that we lose this opportunity for 16 million low income adults to really gain coverage through the Medicaid program and states lose their federal funds. And coverage would fall back to varying state levels and some of the very important integration and streamlining that's being done around how to do eligibility processes would also be lost in this event because many of those expansions - streamlining efforts are being covered by the ACA.

And if the rest of the ACA stands but only the mandate is rejected then the ironic thing is that many of the lowest and poorest income people, those under a hundred percent of

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poverty, would not be eligible for the subsidies that would be offered to people above the poverty level. So you would leave the very poorest outside of any coverage. But I think many don't think that the mandate would be knocked out while the rest of the ACA would stand.

But there's also some broader implications that I just wanted to tick off quickly. The states have now been operating under a maintenance of eligibility requirement that keeps the from rolling back their eligibility levels below the ones that have already noted or are already fairly low especially for adults.

And if the ACA provisions are struck down then the states would be released from that and so we could see even more dramatic roll backs in eligibility coverages. States continue to face their severe budget constraints without any additional infusion of federal funds as they would have gotten through the ACA.

And second, SCHIP funding through 2015 was provided through the ACA and so that could be a jeopardy leaving more of America's children uninsured. And finally, other provisions in the ACA included a bump up in primary care, payment fees under Medicaid, innovation center demonstrations to look at the implications of trying to better coordinate managed care for some of Medicaid's disabled and dual-eligible populations and

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many long-term care provisions to try and provide better in-home and community assistance for those needing long-term care. So all of those provisions are at risk as well. But even beyond that, this is an area in which Congress has overtime used this kind of approach as saying we'll extend coverage to more groups and we'll mandate that you cover them and we'll provide federal funds to do that for example all of children under poverty became eligible for Medicaid through exactly this kind of an expansion.

So some of these previous coverage expansions to pregnant women and children that we've come to see as fundamental to the way we provide coverage to the lowest income population could be at jeopardy depending on how the Court ruled or how broadly the Court ruled. And also, then obviously, any future expansions might have to use an optional approach as opposed to a mandatory approach because it could change the way in which the federal-state relations work. And it doesn't just have implications there for the Medicaid program, it has implications for all the kinds of federal grant-made programs maybe not as dollar-wise large as the Medicaid program but certainly very significant to the state's welfare reform, all of the various matching approaches that have been there.

The Pandora's box that could be opened by a Medicaid

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decision by the Court goes well, deep back into some of the deals, some of the very broad provisions of how we provide social services, highway services, it's not just one way of federal funding but it's the entire relationship of how the federal government and the states interact over how states can spend federal funds that are allocated to them.

DREW ALTMAN: So needless to say, the stakes in this case are huge. They're huge legally, they're huge for the ACA, they're huge for people and I think if we've done nothing, we've established that so far. Now for me as a political scientist we get to the juicy stuff. How the President, the Congress, the states might respond.

As it turns out, Chris and Sheila have done an incredibly complicated statistical model to tell us exactly how this will work out and they're going to present their sensitivity analysis now. [Laughter] Chris will lead off, I think, and then Sheila and then we'll just go straight to the pollster in chief after that and finish up and take your questions.

CHRIS JENNINGS: Thank you so much, Drew. Not much of an act to follow there. I think what we're going to do is focus particularly on, at least what I'm going to try to do, is focus on the if then equation rather than any type of analysis more [laughter] and then you're going to tell me we're all

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wrong, well to the pol findings. [Laughter] I was hoping we'd be after the polling data. Anyway, this is idle speculation. When you do if-then I think the one thing in terms of the political response you have to acknowledge that we're in a presidential election, this is huge. It has a big impact on the public's perception on the debate, on the presidential election, and the Congress, and then on the ability to if something happens to overturn whether you can legislate to change and alter anything. So I'm going to go through those filters very, very quickly.

First of all, I'm so happy to hear Joe's analysis. Now I can go on vacation in June [laughter] and my wife will be very happy. The only thing I would disagree with him, because I want to believe him, is that if that is the decision, I don't think it will be anti-climatic because it will be relief and it will be impactful to the public.

Maybe precisely because of Gore v. Bush there is this uncertainty. You can talk all about the legals, but people, I'm just telling you there's a big uncertainty out there and no one knows and I will tell you people who oppose or the people who support this law are going to wait until they hear that announcement before they have any idea what to do and it's very complicated.

Now as a general rule, the one thing I would say about

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the politics is that presidential elections, which we are in a presidential election year, are governed not by the bases, they are governed by the independents.

We tend to hear a lot of this debate between the bases of the two parties because that's fun TV, but I think the public, what I am going to assert is that if we do have this anti-climatic ruling that the public at large particularly the independents will view this as an affirmation that this is the law and they'll want to move on to other things. They think about, there are many other issues that you should be focusing on. The law's the law and what we found in a, what I've seen in other polling data is, if people believe this is legal and is the law then they kind of move on and I'm talking about the center of the country, not the bases of the country.

By the way, the reason why the individual requirement to purchase health care, I never use the word mandate, is not as hard to believe that will be a hard take up rates because when it is the law, we are one of the most law-biding citizens in the world. If you look at tax compliance, if you look at a lot of other historical analysis of how our country reacts to the law. You know, I think it would be very, very devastating if that individual requirement to purchase health care was struck.

I will say my first analysis is it will be an

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affirmation of the law and for the most part the center will say move on to other issues. And yes, the bases of both parties will still fight and particularly the Republican Party because this really, I have to tell you, I've never seen an issue like this. This is a Mars versus Venus dynamic here. And you really, even some of my closest friends, sometimes you just can't even have an engaged conversation. [Laughter] But I'm not talking about Sheila. Well, I was talking about my closest friends. No, no, no. [Laughter] Well, that's a whole separate subject. So, that's my first suggestion. My first suggestion is that it will have an impact to move on to other issues and that will be notable for that reason alone.

Now, if any significant aspect of this law is found to be unconstitutional, and I think it's more likely to be individual requirement than anything, but let's just say for the purpose of conversation it's that, I think you see a very different dynamic. I do believe, and I was talking to Bill McInturff, a Republican pollster, he actually believes that it will spur the Left and the base the Democratic Party to actually reengage and say I'm going to lose something and it will have a positive impact on electoral politics to some extent.

But I find myself sort of disagreeing with him a little bit. I'm hopeful he's right. As a general rule, I think that

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may be right. But I think that if the Court does that, it will affirm to many people, even independents, that those who accuse it to be a government over-reach, that it will somehow validate that. I think it will actually change the debate around the number one health care issue from more likely to be a Medicare and entitlement debate which it otherwise would have been to the affordable care act and what we're going to do about it. I think that's very significant and I think it could have an impact on the election. I think it could be very, very significant, again, although I'm hoping that Bill McInturff is correct.

The last thing I just want to talk about very briefly is congressional response to a change if the Court rules against any aspect of this law. Yes, and you're hearing and you're seeing lots of articles. What do you do to fix this if x provisional law doesn't work or is found to be unconstitutional? Here's the problem, there's no consensus in the congress as what to do.

Number one, even within the Republican Party there isn't a consensus about what to do, but even amongst the Democrats. There will be very, very little consensus, I think, that can be quickly constructed, certainly before 2013, that you can even contemplate. This will be all about 2013 and beyond. And even then, I think we're going to have a split

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government effectively in the Senate because we'll probably have 50, very low 50s, in the Senate, Republican or Democrat. It will be very difficult to get much done substantially. What is remaining in the law after the Court rules if they anyway alter it is going to be very difficult to fix or to alter or to change.

What does that mean? I don't know. [Laughter] It's happening in the context of the major tax reform debate, a major debt and deficit reform debate. I think it can be extraordinarily challenging and problematic and I'd like to be invited to another panel next year to talk about that. So I'll conclude.

DREW ALTMAN: You got it.

SHEILA BURKE: I'm going to begin where Chris ended and, in fact, agree with much of what Chris has suggested. I think if I were to describe generally what I think the reaction will be, the framework is it depends. It depends on the circumstances that will exist on whether or not it's upheld or not. I also agree with Chris that I don't think people will view it as anti-climatic. I think it will push one side or the other to respond. I also don't think I would agree that it's about nothing. I think there is some fairly, and Joe certainly presents a strong case for his point of view, but I think those on the other side feel as strongly. That it is very much about

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some fairly major principles including the role of the federal government, the relationship with the states, and the sort of wide range of authorities at the federal government level.

I think Larry has gone through very effectively sort of some of what the questions might be, but I think the fundamental challenge we face here is there really is no consensus on how one might go forward. If in fact it is upheld, you could argue that there is no action required; that we simply move forward. I think we have to think about, again Chris's point, the context in which all of this is going to occur. It is occurring essentially in an election year where not only is it a presidential election year, but you've got the entirety of the House and a third of the Senate that are in play.

In many cases in very fragile races, you have the freshman, large freshman class that are going back to their districts. You have a number of members of the Senate who would have historically viewed as relatively safe who are not, in fact, safe. There are a whole lot of things that are occurring during this same period of time. The other screen, of course, is the broader debate that's taking place. This isn't in the absence of a lot of other discussions around issues including, and specifically the issues around the debt and around deficit spending.

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I think we can all agree fundamentally that nothing is really going to happen until 2013. So what happens in 2013 will be with that in place, that is what has occurred in either the House or the Senate and the White House and what will likely begin to occur in terms of the attention to the deficit and the debt. Having sat on the Finance Committee Staff for years, I can tell you the difference in the position of the members either when you're discussing taxes or talking about spending.

I can assure you that their first priority will be the tax side. The attention to sort of the questions about how one begins to look at tax reform and entitlements will come somewhat behind that. Depending on what happens with the Court decision and how much of those issues, or how many of those issues are still in play, will fall behind in some respects this broader debate. Its priority, while important to the base, will nonetheless fall behind, I think, some of these bigger discussions. If it's upheld, no action may be required on those who support it, but on the part of those that do not, it will be essentially an incentive to re-fight all of the individual elements point by point.

So you might imagine most at risk might, in fact, be the individual mandate, might be the employer mandates, might be the Medicaid expansion, the independent payment board.

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We've already heard those discussions. The patient-centered outcomes research. There are a whole list of individual items that you might imagine that people will simply try to go after. They will go piecemeal from the left and from the right in terms of trying to alter essentially what's in place. I don't think we can assume that people will simply say alright the Court has decided, let's move on. I think those fights will continue and will be in a very partisan environment as they have been most recently.

I think you can also assume that the desire to perhaps fix some of the elements, the legitimate issues that arose in the context of the implementation of the legislation. There are a great many people who essentially acknowledge there are some elements that might have been drafted differently. Certainly some of the House folks believe they could have improved on the Senate bill. The opportunity to clean up things that people universally agree ought to be fixed will also be impaired by what are the remaining politics in terms of the overall legislation.

For example, if there are issues on the timing, one question is to whether or not states will be ready in terms of 2014 for the exchanges. If the administration were to come back and say let's revisit what the timeframe is in terms of implementation of elements, you can imagine that will give the

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opponents another opportunity to essentially go after those issues.

Now if it falls, or if elements fall, among all the things that we've talked about in the four issues that are being debated, then on the left you have the question of what you can add back and the battles over individual elements that are critical. If they were to take down the mandate but nothing else, if they were to take down Medicaid but nothing else, you can imagine a series of discussions about adding back. In the case of the Republicans, you might well see an opportunity to fix some of the issues they admit that are in fact an issue.

For example, insurance reforms. So you might go back in terms to some of those alternatives that have been discussed in the past. And of course in respect to Medicare, which kind of doesn't come up in many of these discussions, is a huge element of the legislation but is also likely to be debated in the context the broader deficit reduction. If essentially the entire thing fell, you would see all of these elements come back in a variety of ways from either the left or from the right.

You can imagine if there are elements that are severed and others aren't, people will go after the remaining elements repealing the expansion. Perhaps offering up tax credits,

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which is something that's been discussed in lieu of in the past.

Medicare again will come back to us as part of the broader budget discussion. The insurance reform elements; if they're not repealed you can imagine the industry is going to be anxious. If the mandate goes and nothing else goes, the industry is going to be quite anxious to bring back those questions of what happens in the case of guarantee issue and the other implementation changes for the insurance industry. At the same time you have public that are, I could admit happily with three children under that age of 26, I'm just thrilled to death that my kids are going to have some opportunity for coverage.

You've got that kind of tension that will play out, not only with the independents but with the base as well on both sides. I think the reality is you're going to be in - normally you have this kind of honeymoon period that occurs after an election where things settle down and the Congress actually gets back to doing its business.

We haven't seen that recently and don't anticipate seeing that after the 2012 election so you have a highly challenging environment with some question as to what the balance will be either in the House in terms of margins or the Senate, whether it changes hands or not or what the margins

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might be. Whether the White House changes or not. Going into a period of time where there will be enormous attention on these broader questions around deficit reduction and tax policy and a series of these issues that could either play into the deficit reduction issue or essentially will fall behind in terms of being secondary is the broader questions.

I think it is an enormously difficult time with the challenges both the absences of political comity that we've seen over the last few years had no named his fate changed in the opportunity to either fix if it remains in place those things that need fixing and I think are diminished because of the partisan nature of the environment. I think if it falls, then it's a question of re-fighting some of these fights one by one from both the base side, from the left and the right.

DREW ALTMAN: I always admire how deftly Sheila puts things a highly challenging environment. [Laughter] Okay, we should thank you. We should not forget the public.

MOLLYANN BRODIE: *The Public.* Before we get to the topic today, I think that I just need to quickly put the public's views of the Supreme Court case in context with their views on the ACA. I want to start here. What this chart illustrates is the hallmark of public opinion as it turns to. What it shows is the remarkable extent which the public now feels the same way about the law as they did on the day that it

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was passed. Four in 10 favor it, 4 in 10 oppose it. Pretty much with the exception of a few little blips here and there, pretty much the same as every measurement we've taken in every month for two years straight.

There's been a lot of events that we've all been following over those two years, but the public has been dug in on this from the beginning. I think what's really important is that this divide in opinion is not random at all. It is completely the result of a consistent partisan divide. The Democrats in the blue line have always liked this law. The Republicans in the red line have always opposed the law. That has been the case since the day it was passed.

Now, there's two other general points that I think have to get made before we can talk about the Supreme Court case. The first is that this law is still not real for the vast majority of Americans. So you see here on this slide the grey dotted line at the top. That represents the share of people who tell us that they have not been personally affected in any way yet from the ACA.

In addition, about 6 in 10 tell us that they still don't have enough information to understand how the ACA is personally going to affect them. That is virtually the same share as who said that the day after the law was passed. Now, this is not surprising given that the bulk of the provisions

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that affect the largest share of people don't get implemented until 2014, but what it means is that all opinions, all reactions are not based on actual experience. They're not based on real knowledge of what's in the law and we could talk about misperceptions during the discussion if you want.

There's one more point before we get to the case itself and that's that while the law itself has never garnered majority support, many of the individual provisions have always been incredibly popular with the public even on a bi-partisan basis. I want to make three points about this chart. Firstly, many of these provisions, like at the top bar, tax credits for small businesses, the Medicaid expansion which we've talked a lot about today, requiring easy to understand summaries, the ability to have appeals for health plan decisions.

These are all individual provisions that are extremely popular. Eighty percent, 70 percent like these things. That's the blue bars. The second point is the orange bars. Many of these provisions are things that people don't know about, that they're in the law. So the orange bar represents the share of people who recognize that these are in the law.

The third point, and perhaps the most important one for the rest of our discussion, is that the individual mandate has been the exception to this general trend over the entire course of this two years. The individual mandate has remained the

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least popular provision of all the ones that we've asked about, and it remains one that most people are aware of. Okay.

With all of that as context, let's turn to the topic of today and what you see here is about half of the public thinks that the Court should rule the mandate as unconstitutional and about the same share expect that the Court is going to do that. What you have to recognize though given the finding on the other page about the fact that the individual mandate is the least popular provision.

It's the one provision that even majorities of Democrats and independents don't like, is that their views on what the court should do about the mandate absolutely mirrored the public's views about the law itself. In the bottom bar, you see that 12 times more of those who oppose the law want the Court to find the mandate unconstitutional. That's that 83 percent in the orange versus 7 percent in the blue. On the opposite side, two times as many who favor the law want the Court to uphold the provision. The 50 in blue compared to the 26 in grey.

Also, while today we've been talking about all the legal issues, about severability, and the policy issues, about how the ACA might work without a mandate, neither of these are anything that's really on the public's mind or on their radar. Instead, you note here that 6 in 10 believe that parts of the

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ACA will just still be implemented even if the individual mandate's struck down.

I think this is important when you think about who really cares a lot about the mandate sticking and who doesn't. They don't understand the policy implications. They don't understand how it all ties together. So great, the rest of the law had everything else I like about it, all those other provisions, that all gets to stay. I don't care. It doesn't really matter what happens with this case because the ACA still sticks around.

Certainly, the thing that's on all of our minds right now and we've started talking about it is what the public might actually do once a decision is made by the high court. I have to start off by noting that few Americans today say that they're following this case. Which isn't surprising; it hasn't happened yet. It goes deeper than that because, in fact, 4 in 10 told us that they thought that the law had already been repealed or they weren't sure. [Laughter]

So really we're talking about a baseline set of how Americans feel right now and I think what you see here is very much what Chris was implying. When we say how do you think you might feel if you heard that the individual mandates deemed unconstitutional or constitutional, the vast majority kind of come out in the middle. They have a moderated response. They

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say they'll be satisfied or the say they'll be disappointed. It's a much smaller share who actually admits or says at least at this point that they would be downright enthusiastic or downright angry.

You can see that by the dark blue 17 percent if it's ruled unconstitutional, 17 will be enthusiastic, 12 percent will be in angry. If it's ruled constitutional, 13 percent say they will be enthusiastic, 25 will be angry. That 25 percent is considerably bigger than the 12 percent for the other case, but that reflects what we've seen from the beginning which is the intensity of the opposition has always been greater than the intensity of the support. The bottom line is that the vast majority of the public just thinks it's another day going on, it'll be a piece of news item and then they're just going to go on because they'll be whatever, it's not really what I wanted it's just done. Forget it, I'm still getting a lot of other things from the ACA or I still don't like the role of government. Wherever their initial dug in position is.

Furthermore, at this point, very few people tell us that the Court's decision is going to change their overall opinion on the law. This is kind of a complicated chart; it's in your packet. It's really the only people who say that their opinion on the law will change. There's very small slivers you see at the top. The little light orange, the little light

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grey.

I think this is the case for two important reasons. The first is that few expect this decision to have a big impact on their own lives, right? I've given you plenty of evidence of why that is. They don't know about it, they're not paying attention to it, they think it's already been repealed [laughter]. Most people haven't had the law affect their life even to start with so why would it make a difference to their lives. So that's point one.

Point two, and Drew mentioned this outside of this discussion, is that the public really has relatively low levels of confidence in the Supreme Court and as you see here, they believe that politics ideology are as likely as legal analysis to play a role in the Court's decision. This is the picture of where the public stands. I think it represents a baseline and it's what they say before the actual decision comes down and probably most important, it's what they say before advocates, politicians, the election campaign, or any of the messaging or framing that is to come where these activists in a sense will attempt to frame and will attempt to influence and will attempt to generate a public reaction. I think the point is stay tuned. We'll keep tracking and see what happens once these other actors actually take a role after they see what the decision is.

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DREW ALTMAN: Great, okay. We are ready for you.

Guests, the usual rules. People will go around I think with mics, but please tell us who you are, where you're from and you can tell us if you're happy or sad today or whatever else you would like to do. The panel members just have at the questions as they wish. You have to have questions. I have questions. Here we go.

JOAN ELKRIDGE: Hi, I'm Joan Elkridge, Georgetown University. I actually have a question about the polling data. In your chart book, it seems that access to care is cited as the number one reason that people are seeing a benefit to the law and followed by the dependent coverage provision. I was just curious what that means. Is that the preventive services piece or what is that access to care mean?

MOLLYANN BRODIE: What we did is we asked people had they been personally impacted. Whether that was a positive or negative impact. Then we had them tell us in their own words what they meant by that. When they say something about access to care, it's often something about they feel like they got services or they got insurance that they wouldn't have had.

Again right now it's only their personal belief about linking it to the law. We don't know, we can't judge whether it was really an impact of the law or not. It also can refer to the fact that their kids can now stay on their plans and a

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lot of people actually mentioned that.

On the other side, when people said that they had a negative impact, most likely they said that their insurance premiums went up or that they lost their coverage and they are associating that with the ACA and I think that's just an important thing to keep in mind as we go forward. That a lot of things will be attributed the health reform law that may or may not actually be a true impact of the health reform law.

BOB SIGGINS: With Alston and Bird. Also a polling question. You talk about the fact that the public doesn't like the mandate, they like all these other provisions, they don't know that they're connected, they also don't think that if the mandate gets pulled out it's going to affect their opinion on the law, but suppose for instance the mandate gets struck down and then the insurance reforms get pulled out with it that people do like. Any indication or thought on whether the public may then say well that's not what we meant? [Laughter] Or wow, we didn't quite get that you couldn't, that one was connected to the other and that opinion may move in directions that might be unpredictable.

MOLLYANN BRODIE: You're exactly right. I don't think we're talking particularly about, not the bases. Bases, and people who are engaged in this issue, probably no. For the vast majority of Americans, they don't recognize what these

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policies do and how they're interconnected and what it's actually going to mean for their life one way or another.

For example, when we've asked before this question about the individual mandate and we've said to people who said they don't like it, well would your opinion change if you realize that most people would already satisfy it because they have employer-sponsored insurance and they are like, oh yeah of course, now it's great.

A lot of this just comes down to really not understanding and I think probably the most important thing to keep in mind when you look at any public opinion data going forward, especially over the course of the election when people start making claims about the role, the case, the law, the issue is having in election is you have to remember that for most people this is about dug-in ideology and beliefs. It's not really about their fundamental beliefs about health care system.

It has become, as Drew wrote in today that was out on the table to pick up, it's really just become a much more symbolic issue and a touchstone issue about the role of government, about whether you like how things are going in Washington today or whether you don't like it. Honestly, it's not nearly as much about what people actually think about health care and health care services.

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DREW ALTMAN: I compared it to the fluoridation debate of many years ago. It's basically why Chris can't talk to some of his friends. Yes, next question.

MIKE MILLER: A health policy and public affairs consultant. Mollyann, you mentioned that a certain percentage of people think the law's already been repealed. Is that because politicians have touted repeal-replace or that the House committees have passed provisions to repeal it but have never gone anywhere? Can you or Chris or Sheila comment on that?

MOLLYANN BRODIE: I would just start by any and all. There's lots of things going on in people's lives and a lot of them are still unemployed, a lot of them are dealing with gas prices, they're dealing with their foreclosures. Paying attention to the ins and outs of this political debate is not top of the line for lots and lots of folks. Still today, when you ask people the most important problem facing the nation, the most important thing they want to hear candidates talk about, what they are most worried about, it's still the economy. Yes, to all of that. Any piece of information they heard or just not paying attention and it's not real for people yet. Most people haven't had a provision that impacts them yet.

SHEILA BURKE: I think that's exactly right. I think

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if you were to go to a town hall meeting in this country, this would be low on the list of issues that people raise. It is largely all the other issues that they're focused on and there is such confusion and fundamental lack of understanding and information about what, in fact, is occurring. They see the headlines in the newspaper, but have little sense of the nature of the debate nor where the debate is taking place at the moment. I think it's really more a question of what are more important and they tend to be those really directly to myself, i.e., the economy, my job, all those kinds of questions.

CHRIS JENNINGS: I just want to say one thing about the potential danger of the opponents of Affordable Care Act are Republicans in this election cycle. If after a relatively perceived to be conservative Supreme Court, if Joe is right, affirms the law and they spend tons of time on going after the repeal of the law, I think that will accrue to their detriment. They have other issues that they know they do better on. I don't know what I'm hoping for in that context of what I just said because I do want the Democrats to win.

The other is that if the individual requirement is found to be unconstitutional, I guess I'll want to underscore that I do think at that point people who will say I thought we had at least bi-partisan consensus around some basic insurance reforms. I thought we all agreed that people shouldn't be

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discriminated against if they had preexisting conditions and all that. That will come up as an engaged issue, say well then we'll fix it. The problem will be it will be extremely difficult to get a consensus on how best to fix it and I'm somewhat concerned by people saying well we can fix these things. One, substantively on the policy grounds it is very difficult fix as underlying legislation without an individual requirement just on the policy. On the politics, it may be virtually impossible.

SHEILA BURKE: Chris is confirming my concern that even in those areas where there is consensus, the insurance reforms certainly are an example where historically people have believed that the market doesn't function and, in fact, ought to be dealt with. There are other areas like that. The environment in which those conversations are likely to take place should an element fall, I think we'll be so poisoned that it will be difficult for people to come back from where they have been. It's always the concern in an election year that essentially people are positioning themselves for either a primary for their base or preparing for a general. Having done so essentially lock themselves into something and then having to come back from that becomes increasingly in today's world becomes a political risk.

I think that, in fact, does become the question. These

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are not the suggestion that you can simply take all these pieces apart easily. I think it ignores the reality of the relationship. Diane's point about the serious issues that are raised in the context of Medicaid, if in fact it falls, if in fact you essentially take away those provisions and people can access, if the subsidies remain, if the exchanges remain that people at the lowest income level can access those issues, the opportunity to come back and rethink how one does that becomes a much more complicated question.

I think it makes it enormously difficult and frankly in addition to the politics of all of this and the other issues around tax reform, we're coming towards an Armageddon at the end of the year when you've got the question about the sequester and whether it plays out. The question of having to increase the debt ceiling, which is likely to occur again in the fall and maybe get extraordinary circumstances which takes us into December or January. All of these things are going to happen at an extraordinarily complicated time.

RON SMITH: Of the American Human Services Association. Assume that the majority of the act is upheld by the Court, and assume that you have a Republican president come January who has run on the promise to repeal all of the regulations for the Affordable Care Act on day one. Is that realistic, is that possible that he could do that and what would be the

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consequences?

SHEILA BURKE: As a longtime Senate staffer, I don't think so. There is this division in our government in terms of who passes and who doesn't. In fact, it will require an action on the part of Congress for some elements of this. There are certainly some things that can be done, but fundamentally it is a statute and presumably it will have to come back in a variety of areas and engage the congress. I think it cannot, in fact, be done unilaterally. Joe may have a more informed opinion, but my view has always been that it will require legislative action in either case.

JOE ONEK: There have been a lot of regulations issued and presumably, although there are legal constraints on how quickly you can get rid of a regulation, somebody could do it. That would just create chaos because the bill would be in place, but the ability to regulate it and no president particularly Romney who was after all a business like an efficiency type person would create such chaos and would pay a terrible price.

I think Sheila's correct; the route they would have to take is a legislative route. I should say one thing on that, a lot of people say oh it can't be repealed because of the filibuster and the Democrats would presumably filibuster. You have to remember that key parts of the bill, including the

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Medicaid expansion and the subsidies, the things that really give people health insurance were passed under reconciliation by majority vote and could certainly be unpassed by majority votes.

If, and it's certainly not beyond the realm of possibility, you have a Republican president, continue to have a Republican House and even have a very narrowly Republican Senate, 50 would all be necessary in that case, they could repeal clearly key sections of the bill although oddly enough not the mandate and not the insurance reforms, but most of the provisions that expand coverage for the poor could be repealed.

DREW ALTMAN: Let's take one more question and then we'll see if panel members have final statements.

JOSH SCHAFFNER: With the National Assembly on School-based Health Care. I have a question about the Anti-Injunction Act. I'm wondering if one of lawyers on the panel could walk us through how the Court could rule given what seems to be a pretty high bar under that act.

JOE ONEK: Well you have, first of all, a question of whether this is a tax. On the substantively side, the whole argument is that it is not a tax. That Congress said they were not doing this under the taxing power, but under the commerce power and that's led to the constitutional arguments to begin with.

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At least one argument is, well if it isn't a tax over there and that's why, in fact, after the Court holds that it isn't tax over there yes, the injunction would apply. In everybody's mind the law would then clearly be constitutional. I think there's one reason. The second, although it's jurisdictional, courts have tried to carve out exceptions and to enable suits to go forward certainly, as I said earlier, there are at least two what you might call equitable reasons why you say that the case should go forward and one of them was sided by Judge Silverman when he decided the case could go forward and that is wait a minute, this is jurisdictional but the point of it is to protect the federal government and to keep people from just rushing in after a law is passed and try to enjoin them from trying to collecting revenues and so on and so forth.

If the federal government is say hey, it's fine with us, there's some deference. If the Court steps back for a second and says look this is a close question, does it apply because it's a tax not a penalty, it's a very close question. What are the public interest considerations which would lead us to decide? I think a Court that was looking at that with no political and partisan views, but saying what's best would have to say it's best that this gets decided one way or the other because we would be in a limbo situation.

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If the Court says well, we can't decide this and we're not going to decide it and it was noted by MaryBeth, under the Anti-Injunction Act, if you wait the case can't even be filed until basically April 15, 2015. It would presumably go through the courts and would have to take a year so the case wouldn't be decided until 2016, which I think would make no sense. The only way that could change, and I don't know whether Chris or Sheila have any views on this, is if congress and presumably the White House support immediately pass the law that is on June 29, the case will come down presumably the last Friday of the month.

Congress could, the next day or the next week, pass a law which says notwithstanding Anti-Injunction Act that doesn't apply to this in which case the case might have to go all the way back to the district courts, but they obviously would act very quickly. It could come up to the Supreme Court. It could even possibly be reargued before the election. It wouldn't be decided until after the election. That would've been gained if that was one of their motives. Do you think that it's likely that Congress would do it or do they just say forget about it?

CHRIS JENNINGS: It would be an interesting discussion about that, but since they can't pass the ice cream resolution week [laughter] it may be a challenge. All things are

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possible.

DREW ALTMAN: Would any member of the panel like to make any closing comment that they have been dying to make and I have not allowed them to make?

CHRIS JENNINGS: Just on the individual requirement. I think the best person who made the best argument for the individual requirement has been Mitt Romney before he was running for president, as was Governor Schwarzenegger. I don't mean to be political; I actually raised this question substantively from a messaging perspective. He and others said that this is an issue of asking people who are free-riding the health care system to pay something. I combine that with probably 95 percent of the voting public. Ninety-five percent either meet the individual requirement or are exempt from it. Ninety-five percent of the voting public. Why aren't these messages coming through better than they obviously are?

DREW ALTMAN: Yes, messaging is an old issue on the ACA. Thank you. One thing I learned, I should've known —

CHRIS JENNINGS: That was a question. Was that an answer? [Laughter]

DREW ALTMAN: No. I'm leaving it as a question since we'll be here for half an hour if we answer it. What I didn't know is that the decision comes down on a Friday so we'll see you all here on a Saturday for our briefing on what it means.

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Thanks to the panel. Thanks to all of you. Thank you very
much. [Applause]

[END RECORDING]

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