

ACA Under Threat: The Potential Impacts of Repealing the Affordable Care Act

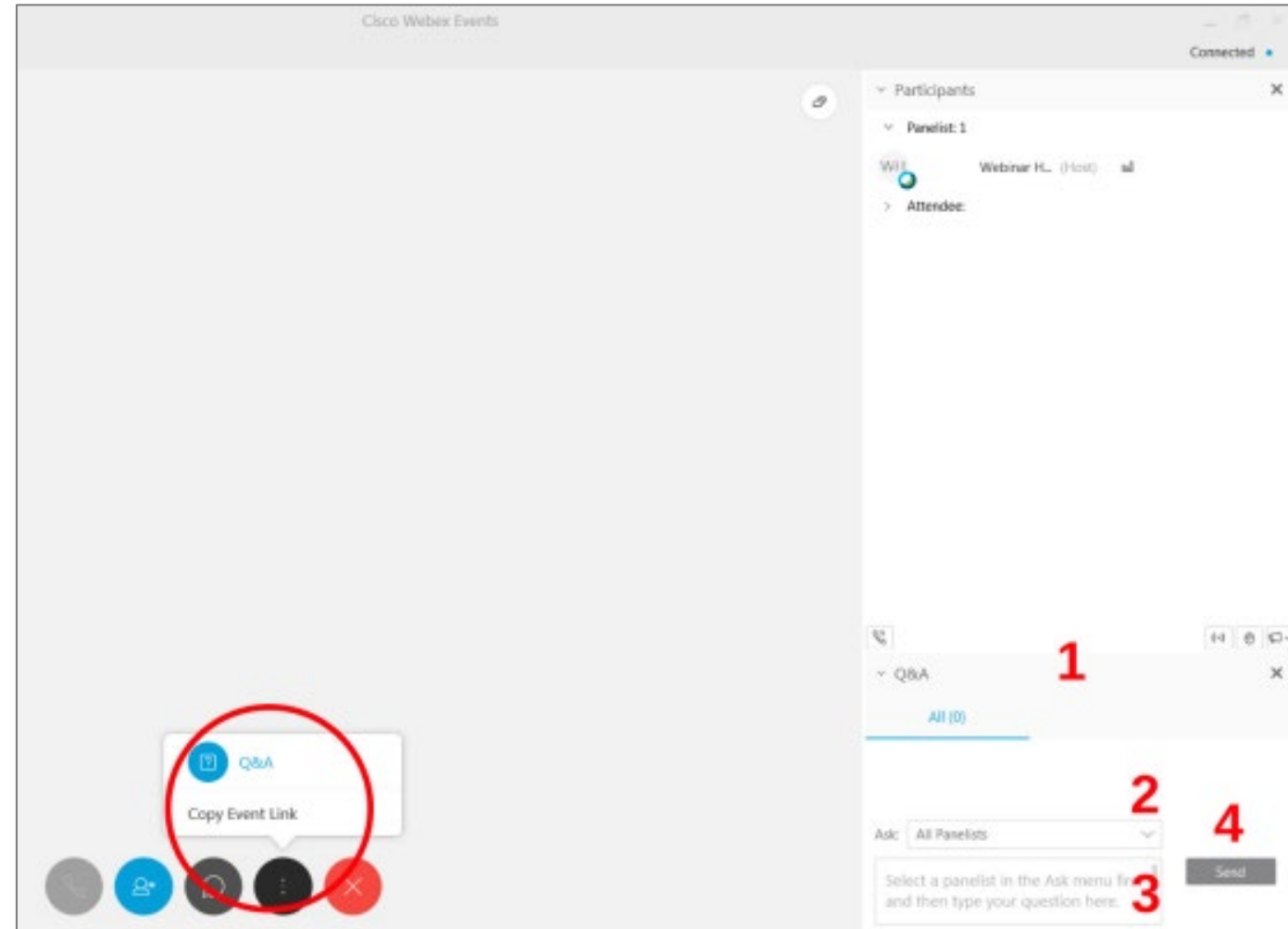
June 26, 2019

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Moderator



Faith Khalik, Legal Fellow, Public Health Law Watch at Northeastern University School of Law

- J.D., University of Georgia School of Law
- Research interests/areas of expertise:
 - Food and Drug Law and Policy
 - Health Policy
 - Clean Water Act

Presenter



Elizabeth Weeks, Associate Dean for Faculty Development & J. Alton Hosch Professor of Law, University of Georgia School of Law

- J.D., University of Georgia
- Research interests/areas of expertise:
 - Torts
 - Law of American Health Care
 - Health Care Financing & Regulation
 - Health Care Fraud & Abuse

Presenter



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 - Medicaid
 - Americans with Disabilities Act
 - Affordable Care Act

Presenter



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- Research interests/areas of expertise:
 - Health Care Law
 - Public Health Law
 - Bioethics
 - Torts
 - International Health and Family Law

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Elizabeth Weeks

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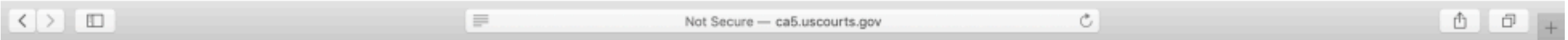
University of Georgia School of Law



School of Law
UNIVERSITY OF GEORGIA

PREPARE.
CONNECT.
LEAD.

Texas v. United States (5th Circuit)



REVISED 06/24/19

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NEW ORLEANS, LOUISIANA
WEST COURTROOM**

The Court has scheduled the following cases for oral argument in Room 265 of the John Minor Wisdom United States Court of Appeals Building, 600 Camp Street, NEW ORLEANS, LOUISIANA on the days shown:

COUNSEL FOR EACH PARTY MUST PRESENT ARGUMENT UNLESS EXCUSED BY THE COURT. CASES MARKED * ARE LIMITED TO 20 MINUTES PER SIDE; CASES WITH NO * ARE LIMITED TO 30 MINUTES PER SIDE UNLESS PREVIOUSLY GRANTED ADDITIONAL TIME. "SIDE" REFERS TO PARTIES IN THEIR POSITION ON APPEAL. IF IN DOUBT, CONSULT THE CLERK'S OFFICE.

TUESDAY, JULY 9, 2019 - COURT CONVENES AT 9:00 A.M.

*No. 17-11524 United States of America v. Linzi Ladawn Shifflett, Appellant.

TUESDAY, JULY 9, 2019 - COURT CONVENES AT 1:00 P.M.

**COUNSEL PRESENTING ARGUMENT IN THIS CASE SHOULD CHECK IN AT THE COURTROOM
BETWEEN 12:00 AND 12:30 P.M.**

No. 19-10011 State of Texas, Et AL. v. United States of America, Et AL., Appellants; State of California, Et AL., Appellants. (45 MINUTES PER SIDE)

WEDNESDAY, JULY 10, 2019 - COURT CONVENES AT 9:00 A.M.

*No. 18-20399 United States of America v. Elekwachi Kalu, Appellant.

*No. 18-50828 United States of America, Appellant v. Carlos Pedroza-Rocha.

*No. 17-40007 United States of America v. Joshua Wallace, Appellant.

*No. 18-10976 Milo H. Segner, Jr., Appellant v. Cianna Resources Inc.

THURSDAY, JULY 11, 2019 - COURT CONVENES AT 9:00 A.M.

*No. 18-60514 Multiplan, Inc., Et AL. v. Steven W. Holland, Etc., Appellant.

*No. 18-20570 Jesus Maravilla, Appellant v. Gruma Corporation, Etc.

*No. 18-30243 Halliburton Energy Services, Inc., Et AL. v. Julius Barbour, Et AL., Appellants (and related cases) (Cons.w/Nos.18-30413 and 18-30533).

LYLE W. CAYCE
CLERK OF COURT

NEW ORLEANS, LA 05/24/19 - 02-IH

IMPORTANT NOTES

1. All oral arguments are recorded. Oral argument recordings generally are available late in the day argument is held. Listeners using "Windows Media" software can search for an argument by case number, date, case title or attorney's name. PERSONAL RECORDERS ARE NOT PERMITTED IN THE COURTROOM. With advance approval however, counsel may contract for an official court reporter to be present and transcribe the argument.

2. Upon request, the clerk will telephone counsel when an opinion is issued.

3. **THE COURTHOUSE OPENS AT 8:00 A.M. PLEASE DO NOT ARRIVE BEFORE THEN.** COUNSEL PRESENTING ORAL ARGUMENT MUST REPORT IN PERSON TO ROOM 105, 600 CAMP STREET, NEW ORLEANS, LA, BEFORE 8:30 A.M. ON THE DAY OF ARGUMENT. AS AN EXCEPTION, COUNSEL IN WEDNESDAY'S AND THURSDAY'S 4th CASES MAY REPORT BY TELEPHONE (504-310-7804) BETWEEN 8:00 AND 8:30 A.M., BUT MUST BE PRESENT IN THE COURTROOM BY 10:00 A.M.

NFIB v. Sebelius (2012)

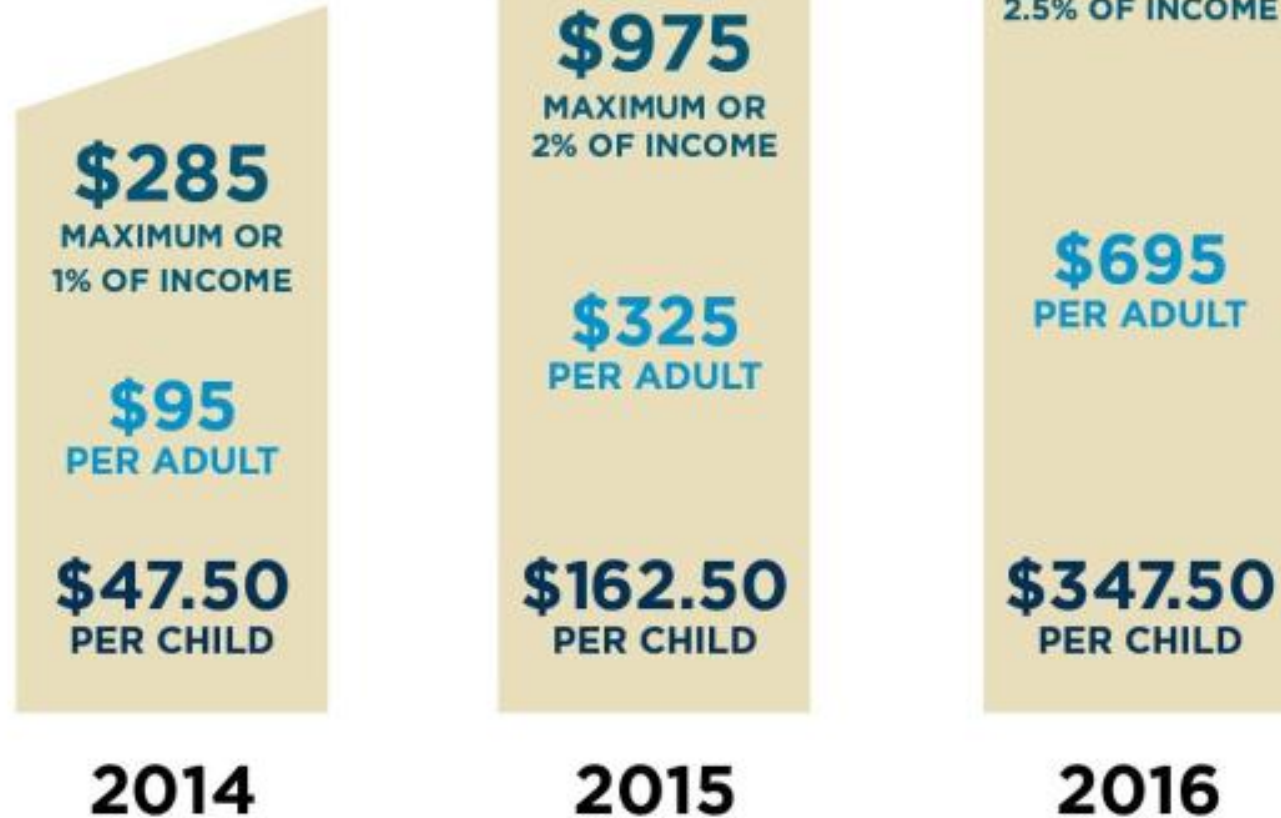


Minimum Essential Coverage Requirement

- Applied to: Above tax-filing threshold (absent applicable exception)
- Satisfied by: Government-sponsored, employer-sponsored, grandfathered, or individual coverage
- Penalties for failing to comply: \$695/individual or 2.5% of income



PENALTIES PER YEAR:



Florida v. HHS

(11th Cir., Aug. 12, 2011)

Plaintiffs:

- 26 states, individual business owners, and National Federation of Independent Business (NFIB)

Holding:

- Medicaid expansion upheld
- Individual mandate struck down as exceeding commerce power
- Individual mandate severable from ACA

NFIB v. Sebelius (U.S. 2012)

- Claim not barred by TAIA
- Individual mandate violates commerce power but not taxing power
- Mandatory Medicaid expansion exceeds conditional spending power
- But severable from ACA

NFIB v. Sebelius

THE INDIVIDUAL MANDATE FOR DUMMIES

**No thanks, I do not
wish to purchase
that pack of gum.**

**OK, tax on
that will be
\$2.35**

NFIB v. Sebelius (Individual Mandate)

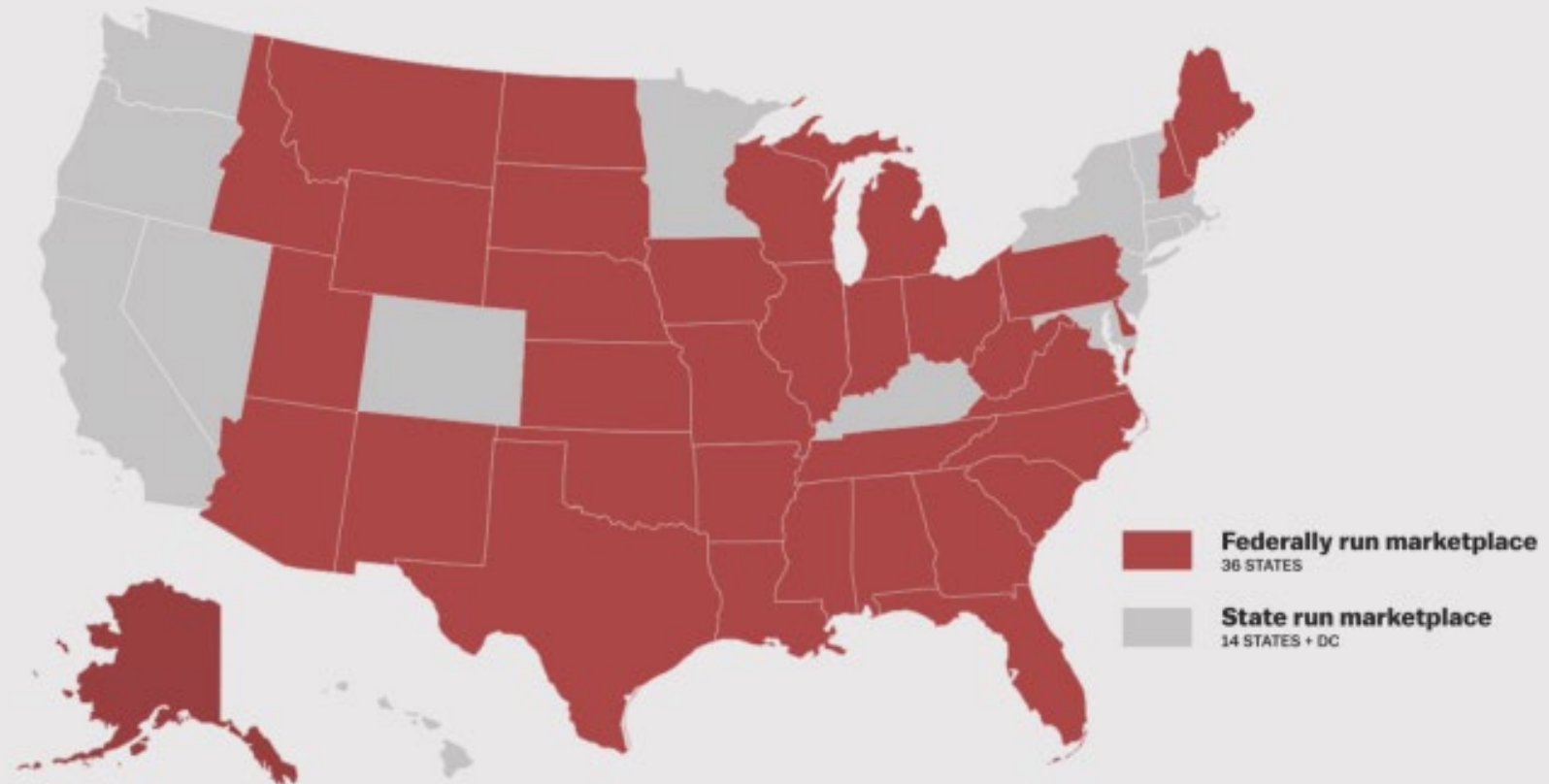
- Choice not to have health insurance does not “substantially effect” interstate commerce
- Government cannot compel individuals into commerce, then regulate that activity
- Necessary but not proper use of congressional authority
- *BUT individual mandate is a valid tax under the taxing power*

King v. Burwell (U.S. 2015)



Insurance subsidies at risk in 36 states

Federally run marketplace subsidies are under review by Supreme Court



Three-Legged Stool



Insurance Death Spiral

The “Death Spiral” of adverse selection



Graphic: David A. Asch, MD, MBA

King v. Burwell

- Administrative law, not constitutional law, decision
- IRS regulation promulgated under ACA delegated authority was valid
- Thus, ACA premium assistance tax credits are available via Exchanges in all 50 states, whether federally facilitated or state-established Exchanges

King v. Burwell



Texas v. United States (N.D. Texas, Dec. 14, 2018)



Texas v. United States

- Filed February 26, 2018; before Judge Reed O'Connor
- Plaintiffs: Brought by 20 Republican state governors (ME and WI later withdrew) and 2 individuals
- Defendants: Against US, HHS, Secretary Azar, IRS, and Commissioner Kautter
- Intervenors: 17 (plus 4 more) states and U.S. House of Representatives intervened to defend the ACA

Tax Cuts and Jobs Act of 2017



March 25, 2019

VIA CM/ECF

Lyle W. Cayce

Clerk of the Court

U.S. Court of Appeals for the Fifth Circuit

600 S. Maestri Place

New Orleans, LA 70130

RE: *Texas v. United States*, No. 19-10011 (5th Cir.)

Dear Mr. Cayce:

The Department of Justice has determined that the district court's judgment should be affirmed. Because the United States is not urging that any portion of the district court's judgment be reversed, the government intends to file a brief on the appellees' schedule.

Respectfully submitted,

Texas v. United States

- Individual plaintiffs have standing
 - Economic injury not required
 - Thus states' standing not addressed
- Individual mandate is no longer constitutional under taxing power
 - No longer paid into Treasury
 - No amount of tax (\$0)
 - Not determined by familiar tax factors
 - No exemption for individuals below filing threshold
 - Not enforced by IRS
 - No longer produces revenue for the federal government
- Individual mandate is inseverable from the rest of the ACA

Severability



Medicaid Background

Established in 1965 as an entitlement to health coverage

» **Aged, blind, disabled, children, parents**

Serves more than 65 million people – the largest source of health insurance coverage and the largest source of payment for long term care.

Federal funds match state expenditures: the average federal match is 58% in FY 2018

Medicaid Flexibility

Federal law establishes minimum requirements and state options

- » Coverage categories
- » Services
- » Provider participation and freedom of choice
- » Premiums & cost sharing

Who is eligible for Medicaid?



“The Worthy Poor”

- **Children**
- **Pregnant women**
- **People over age 65**
- **People with disabilities**

Medicaid Flexibility

Waiver Options

- » **Home and community based services**
- » **Delivery systems**
- » **Experimental and demonstration programs**

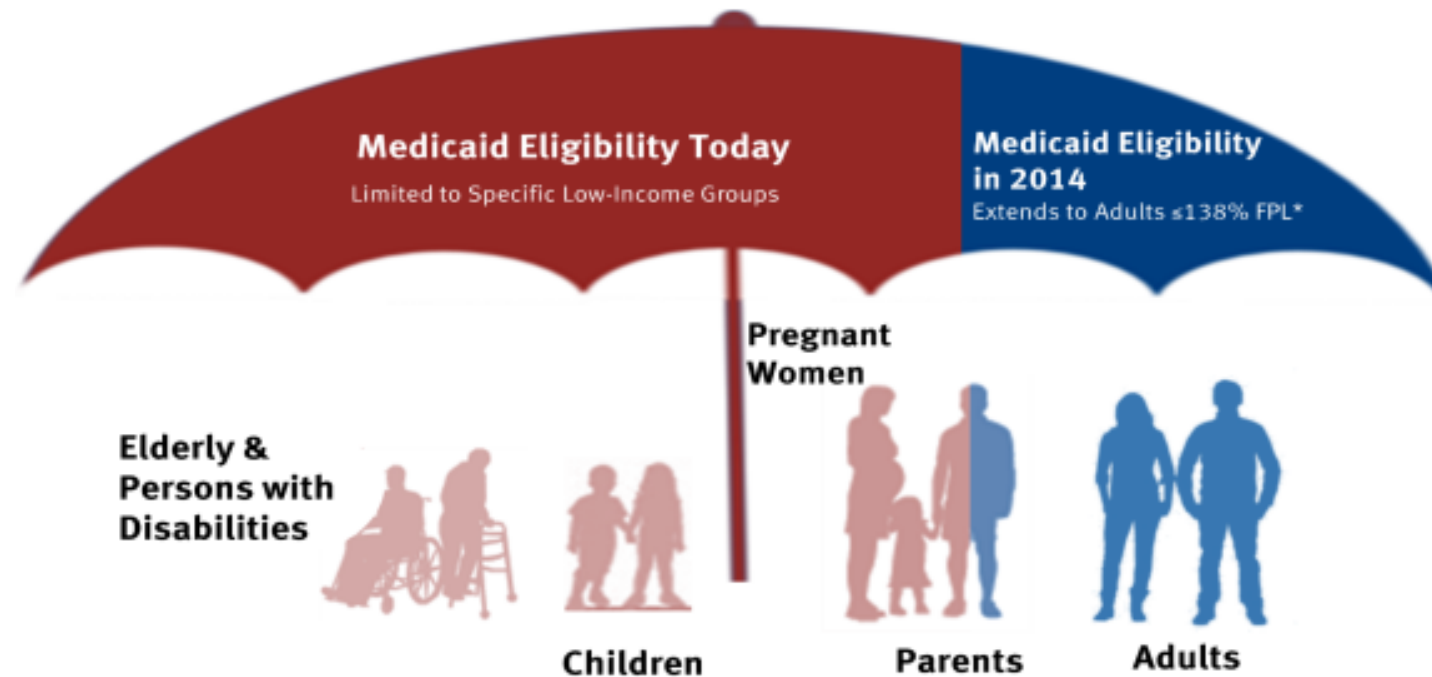
Affordable Care Act Changes

Medicaid expansion

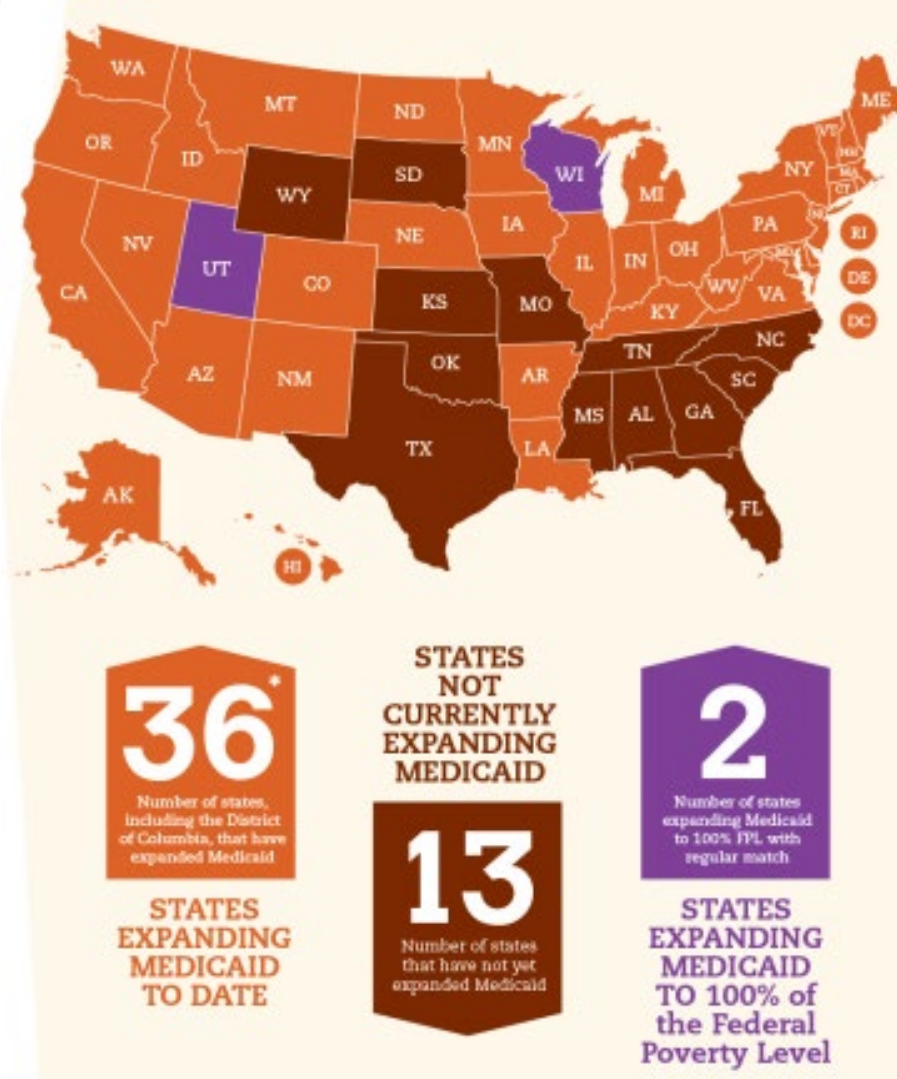
- » Extended coverage to most citizen adults 18-64 under 138% of the federal poverty level.
- » In 2012, Supreme Court held that states do not have to expand.
- » To date, 13 states have not adopted the expansion.



The ACA Medicaid Expansion Fills Current Gaps in Coverage



NOTE: The June 2012 Supreme Court decision in *National Federation of Independent Business v. Sebelius* maintained the Medicaid expansion, but limited the Secretary's authority to enforce it, effectively making the expansion optional for states. 138% FPL = \$15,856 for an individual and \$26,951 for a family of three in 2013.



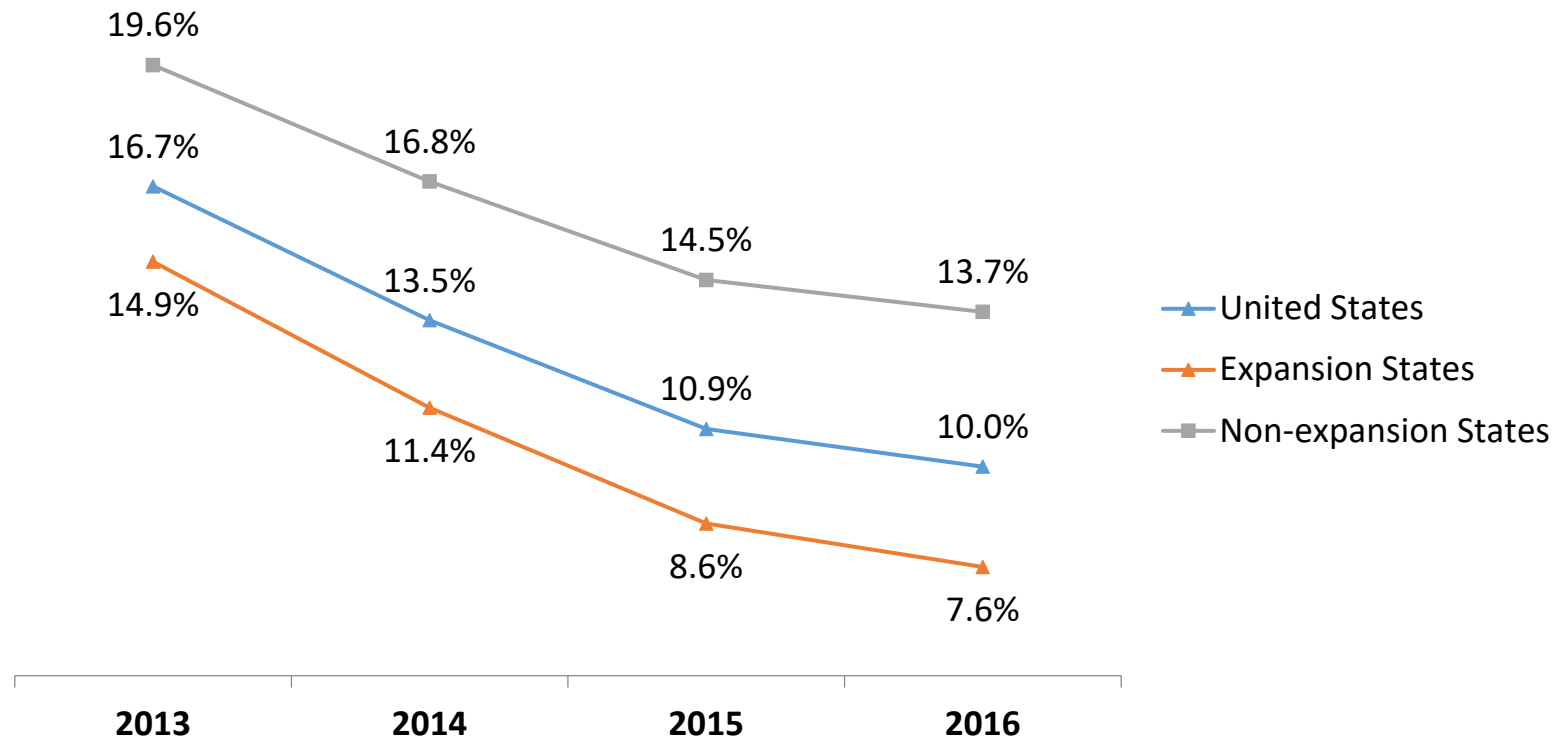
14 Million Newly Eligible Beneficiaries

Data Source: CMS

Graphics source: Families USA

Historic Drop in the Nation's Uninsured Rate

Uninsured Rate, Persons under age 65
2013-2016





PRESENTER:

Seema Mohapatra, JD, MPH
Associate Professor of Law and Dean's Fellow
Indiana University Robert H. McKinney School of Law

Courses: Health Care Law, Bioethics, Public Health Law, Torts

Research Interests: Health Equity, Eliminating Health Disparities, Women's Health and the Law

June 26, 2019

ACA Under Threat: The Potential Impacts of Possible Repeal of the Affordable Care Law



IUPUI

INDIANA UNIVERSITY

Robert H. McKinney School of Law

Slides by Seema Mohapatra, JD, MPH

Roadmap

- Review provisions in the Affordable Care Act that eliminated gender rating and increased coverage
- Discuss gains in coverage and access that may be lost if the ACA is no longer in effect
- Review Section 1557 of the Affordable Care Act, that protects against discrimination in health care, and the proposed rule that would limit Section 1557

Slides by Seema Mohapatra, JD, MPH



THE LANGUAGE OF “WOMEN’S” HEALTH

Much of the literature regarding expansion of contraceptive options, pregnancy care, and preventive services in the ACA uses the term “women’s health” or only includes data about women.

However, both women and transgender men may need to access many of these services.

Slides by Seema Mohapatra, JD, MPH



HOW HAS THE ACA HELPED HEALTH CARE ACCESS/COVERAGE?

Elimination of
Gender Rating

Expansion of Plans to
Include Maternity
Coverage, Contraception,
and Nursing Support

Preventive Care
Services without
Cost Sharing

Medicaid
Expansion

End of Pre-existing
Condition
Exclusions

<https://www.kff.org/womens-health-policy/fact-sheet/womens-health-insurance-coverage-fact-sheet/>

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GENDER RATING

Gender Rating: The practice of charging women different premiums than men

Pre-ACA: Gender rating in individual plans was allowed in the vast majority of states (only a few states had banned the practice)

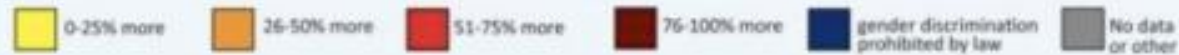
http://www.ncsl.org/research/health/individual-health-insurance-in-the-states.aspx#Gender_Distinction

Slides by Seema Mohapatra, JD, MPH



Pre-ACA and Post-ACA: Gender Rating

How much more do women pay for health insurance?



Before the Affordable Care Act



After the Affordable Care Act
(starting in 2014)



National Women's Law Center, "Turning to Fairness".
Based on comparable insurance plans for 25 year old women and men living in capitol cities.
<http://www.nwlc.org/resource/report-turning-fairness-insurance-discrimination-against-women-today-and-affordable-care-act>

Fuse Washington - www.FuseWashington.org

http://www.ncsl.org/research/health/individual-health-insurance-in-the-states.aspx#Gender_Distinction

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Pre-ACA: Maternity Coverage

Only 12% of individual health plans offered maternity coverage

<https://nwlc.org/resources/women-and-health-care-law-united-states/>

Slides by Seema Mohapatra, JD, MPH



TEN ESSENTIAL HEALTH BENEFITS (MINIMUM REQUIREMENTS FOR ALL MARKETPLACE PLANS)

- Outpatient care
- Emergency services
- Hospitalization
- **Pregnancy, maternity, and newborn care**
- Mental health and substance use disorder services, including behavioral health treatment, counseling, and psychotherapy

42 U.S.C. § 18022

- Prescription drugs
- Rehabilitative and habilitative services and devices
- Laboratory services
- **Preventive and wellness services and chronic disease management**
- Pediatric services, including oral and vision care



ACA: PREVENTIVE SERVICES COVERED FOR PREGNANT PEOPLE OR PEOPLE WHO MAY BECOME PREGNANT

Syphilis screening

Anemia screening on a
routine basis

Gonorrhea screening

Expanded tobacco
intervention and
counseling

Breastfeeding support and
nursing supplies

Hepatitis B screening

Gestational diabetes
screening

FDA approved
contraceptive methods &
sterilization procedures

Preeclampsia prevention
and screening

Urinary tract or other
infection screening

Folic acid supplements

Rh incompatibility
screening

<https://www.healthcare.gov/preventive-care-women/>

Slides by Seema Mohapatra, JD, MPH



ACA: OTHER PREVENTIVE SERVICES COVERED WITHOUT CO-PAY/CO-INSURANCE

Domestic and
interpersonal violence
screening

Sexually transmitted
infections counseling for
sexually active women

HIV screening and
counseling for sexually

Tobacco use screening and
interventions

Rh incompatibility
screening

Urinary incontinence
screening

Gonorrhea screening/
counseling

Well-woman visits

<https://www.healthcare.gov/preventive-care-women/>

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ACA:
OTHER PREVENTIVE SERVICES COVERED WITHOUT
CO-PAY/CO-INSURANCE

Diabetes screening

Breast cancer genetic test
counseling (BRCA)

Chlamydia infection
screening

Breast cancer
mammography screenings

Breast cancer
chemoprevention
counseling

Cervical cancer screening

Osteoporosis screening

Syphilis screening

<https://www.healthcare.gov/preventive-care-women/>

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ACA: PREVENTIVE CARE SERVICES

New group and individual plans cannot charge co-pays/co-insurance for preventive services

<https://nwlc.org/resources/women-and-health-care-law-united-states/>

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ADDITIONAL BENEFITS:

Contraceptive
coverage

Breastfeeding
support and supplies
(including nursing
space/time 29 U.S.C.
§ 207)



MEDICAID EXPANSION AND WOMEN

Medicaid disproportionately covers the poorest and sickest population of women

In states that adopted the ACA's Medicaid expansion, many women are able to remain on Medicaid once they become mothers because of the higher eligibility threshold for parents in these states

<https://www.kff.org/womens-health-policy/fact-sheet/womens-health-insurance-coverage-fact-sheet/>

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PRE-ACA: PRE-EXISTING MEDICAL CONDITION EXCLUSIONS

Pre-ACA many people unable purchase insurance coverage because they had certain pre-existing medical conditions.

Pre-ACA, pre-existing exclusions for pregnancy, HIV/AIDS status, prior breast/cervical cancer, mental illness and domestic violence were allowable and commonplace.

<https://www.kff.org/womens-health-policy/fact-sheet/womens-health-insurance-coverage-fact-sheet/>

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ACA PROHIBITION OF PREEXISTING CONDITION EXCLUSIONS OR OTHER DISCRIMINATION BASED ON HEALTH STATUS

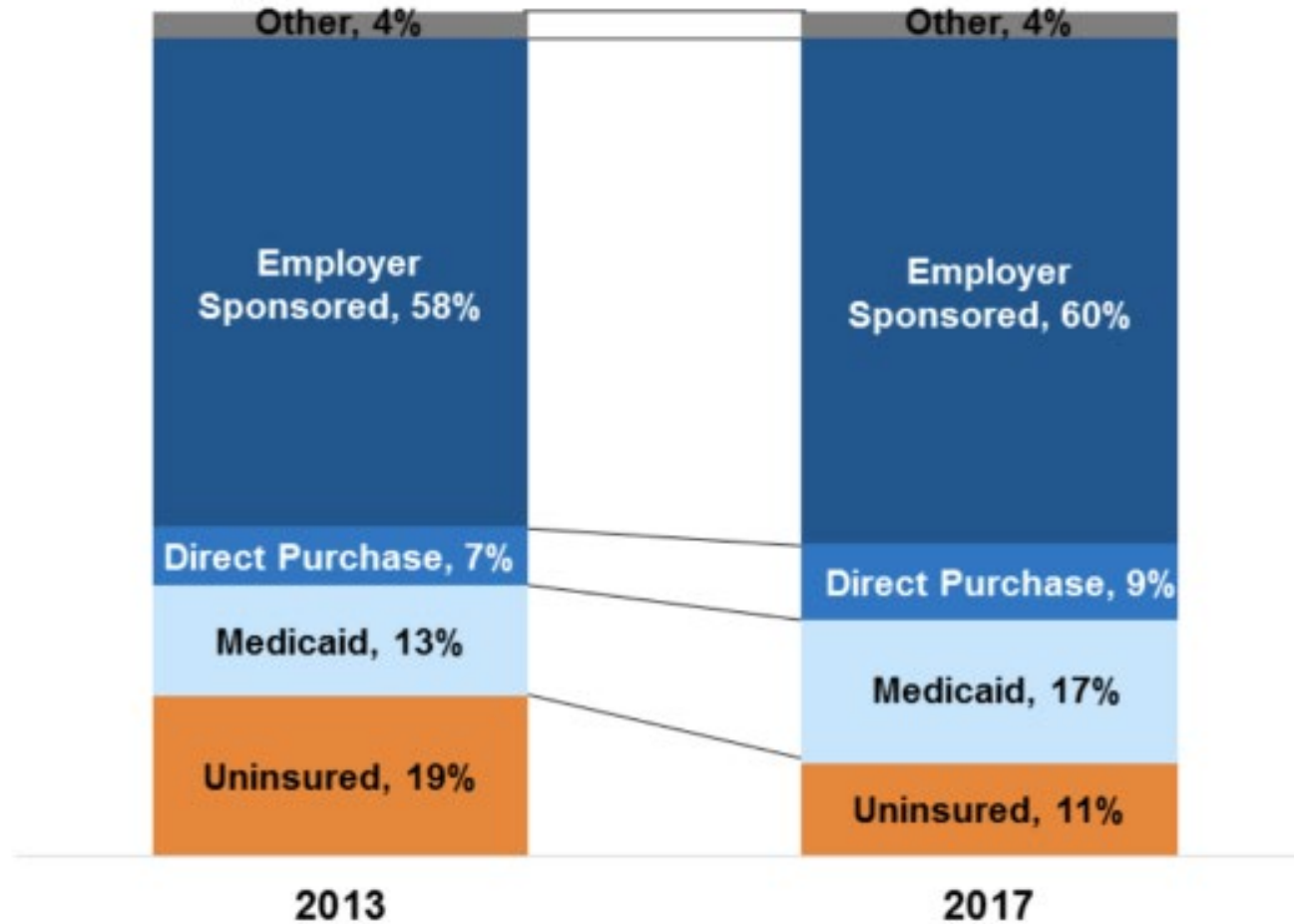
A group health plan and a health insurance issuer offering group or individual health insurance coverage may not impose any preexisting condition exclusion with respect to such plan or coverage.

42 U.S.C. § 300gg–3

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Uninsured Rate Among Women Has Dropped Since the Passage of the ACA



NOTES: Among non-elderly women ages 19-64. "Other" includes those covered under the military or Veterans Administration as well as nonelderly Medicare enrollees.

SOURCE: Kaiser Family Foundation estimates based on 2013 and 2017 Census Bureau's American Community Survey



<https://www.kff.org/womens-health-policy/fact-sheet/womens-health-insurance-coverage-fact-sheet/>

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The ACA's Non-Discrimination Provision

Section 1557: Prohibits discrimination in health care on the basis of race, color, national origin, age, disability, and sex, including pregnancy and gender identity (has not been interpreted to include sexual orientation)

<https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html>

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Who is Currently Covered by Section 1557 of the ACA?

Applies to any healthcare program or activity receiving federal assistance, including contracts of insurance (such as private insurance purchased with the help of government subsidies)

Most entities receive some form of federal assistance and are subject to Section 1557

<https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html>

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Another Threat to the ACA: Proposed Rule Amending Section 1557

Under the proposed rule, gender identity would no longer be protected

act

Under the proposed rule, those insured through government subsidized individual or employer-sponsored plans would lose 1557 protection

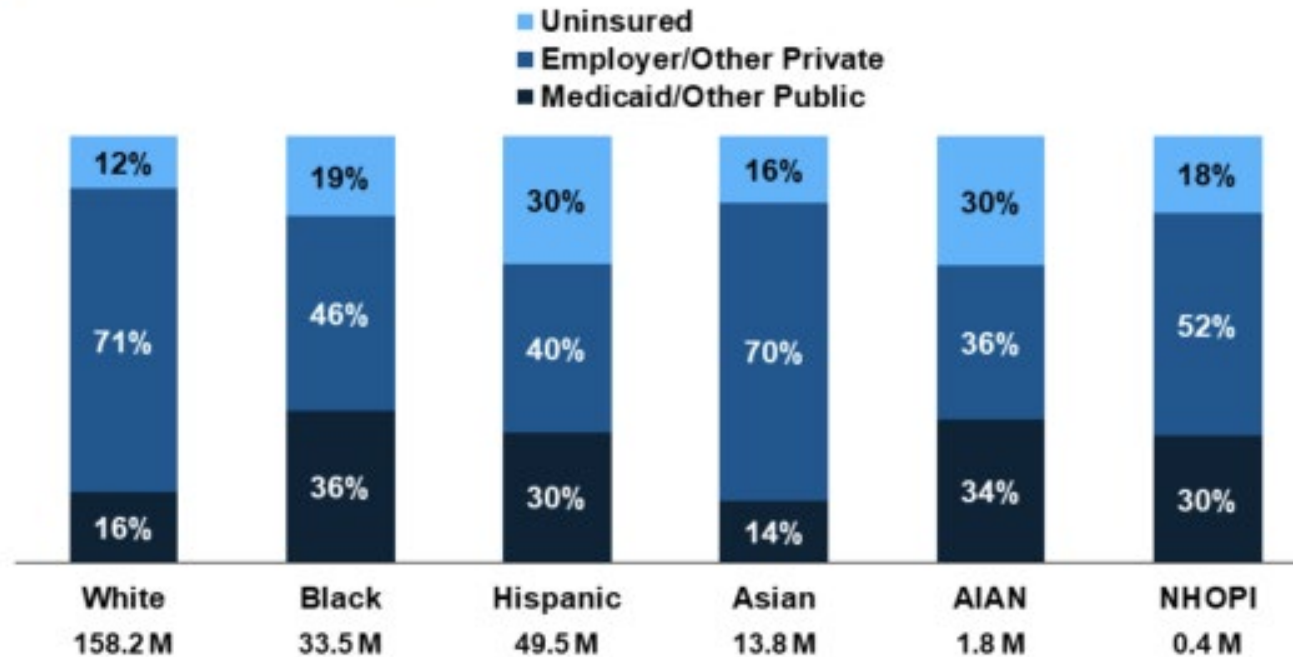
<https://www.hhs.gov/about/news/2019/05/24/hhs-proposes-to-revise-aca-section-1557-rule.html>

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Pre-ACA Insurance Coverage by Race/Ethnicity

Health Coverage of Nonelderly Individuals by
Race/Ethnicity, 2013



Note: Persons of Hispanic origin may be of any race but are categorized as Hispanic for this analysis; other groups are non-Hispanic. Includes nonelderly individuals 0-64 years of age. NHOPI refers to Native Hawaiians and Other Pacific Islanders. AIAN refers to American Indians and Alaska Natives. All values have a statistically significant difference from the White population at the $p < 0.05$ level.

Source: Kaiser Family Foundation analysis of 2013 American Community Survey, 1-Year Estimates.



<https://www.kff.org/disparities-policy/issue-brief/changes-in-health-coverage-by-race-and-ethnicity-since-implementation-of-the-aca-2013-2017/>

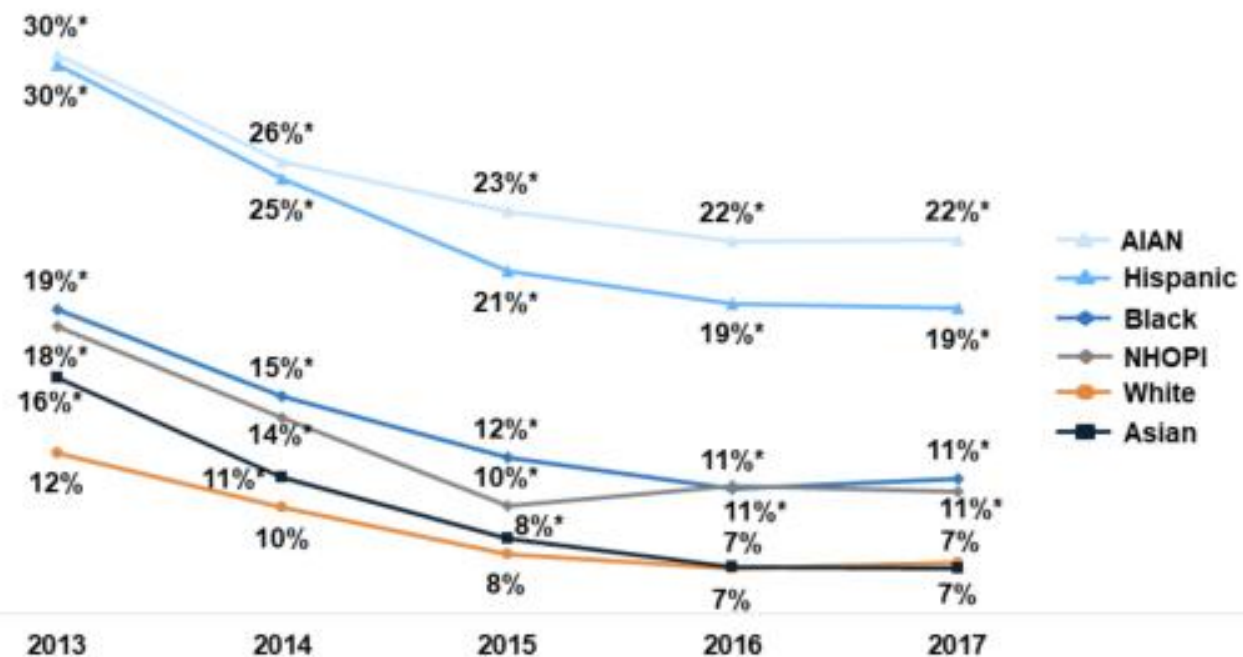
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Post-ACA Insurance Coverage by Race/Ethnicity

Uninsured Rates Among Nonelderly Individuals by Race/Ethnicity, 2013-2017



Note: * Indicates statistically significant different from the White population at the $p < 0.05$ level. Persons of Hispanic origin may be of any race but are categorized as Hispanic for this analysis; other groups are non-Hispanic. Includes nonelderly individuals 0-64 years of age. NHOPi refers to Native Hawaiians and Other Pacific Islanders. AIAN refers to American Indians and Alaska Natives. Source: Kaiser Family Foundation analysis of 2013-2017 American Community Survey, 1-Year Estimates.



<https://www.kff.org/disparities-policy/issue-brief/changes-in-health-coverage-by-race-and-ethnicity-since-implementation-of-the-aca-2013-2017/>

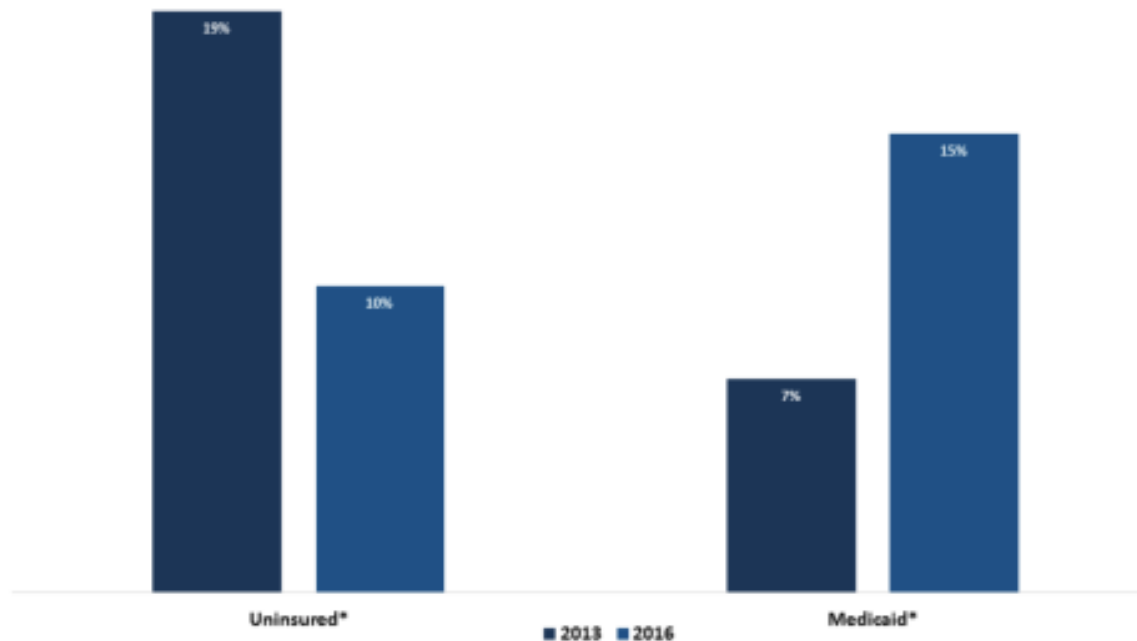
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Pre- and Post-ACA Insurance Coverage and Medicaid Coverage Among LGB Individuals

Changes in Uninsurance Rate and Medicaid Coverage, Among Lesbian, Gay, and Bisexual Individuals, 2013-2016



* denotes statistically significant at $p < .05$.
Source: KFF analysis of NHIS, 2013 and 2016.



<https://www.kff.org/disparities-policy/issue-brief/the-affordable-care-act-and-insurance-coverage-changes-by-sexual-orientation/>

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The ACA and Disparities: Data Collection

- Requires that all national federal data collection efforts collect information on race, ethnicity, sex, primary language, and disability status
- Provides HHS the opportunity to collect additional demographic data to further improve our understanding of healthcare disparities



Contact Information:

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Twitter handle:

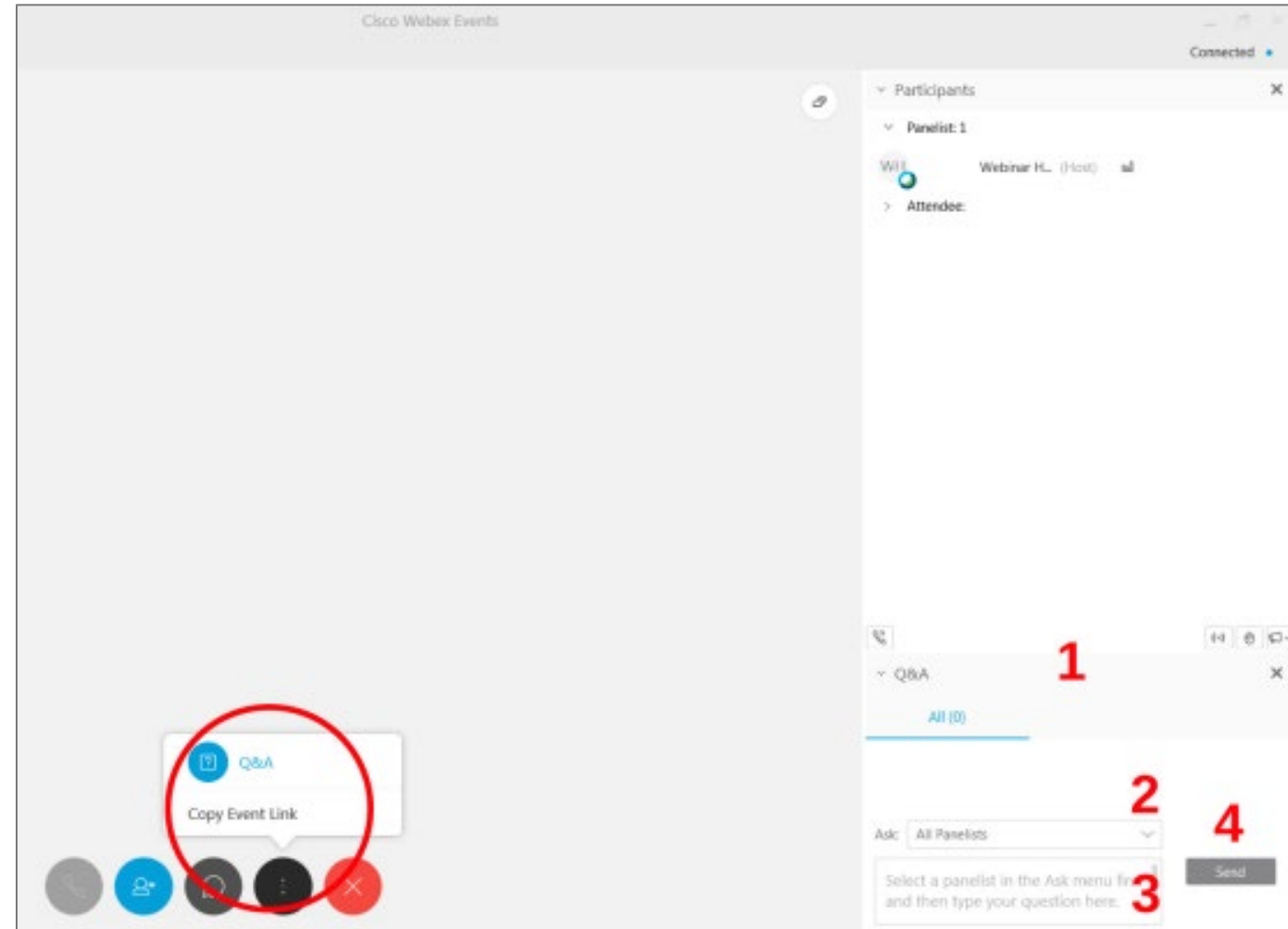
[@profmohapatra](https://twitter.com/profmohapatra)

Slides by Seema Mohapatra, JD, MPH



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2. Select “All Panelists”
3. Type your question
4. Click “Send”



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2019 Public Health Law Summit

Data Sharing to Improve Community Health
October 3-4 | Plymouth, MI



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