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FOR IMMEDIATE RELEASE:

March 28, 2012

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Comments on Supreme Court Oral Arguments Day 2: What's at Stake for Utah in Day 3, besides the reputation of broccoli?

Salt Lake City—The mandate took a good grilling on Day 2 of oral arguments before the Supreme Court. Based on the comments of swing justices Anthony Kennedy and John Roberts, there may be even more at stake in today's oral arguments on *severability* (i.e., is the mandate inextricable from the rest of the reforms?) and the Medicaid expansion. What is clear is that the vote on the mandate will be very close when the Supreme Court rules on the case in late June.

What happens if the mandate goes down? "The mandate is necessary for the success of the private market reforms that are at the heart of the Affordable Care Act," says Judi Hilman, Executive Director of Utah Health Policy Project. "If the mandate goes away, private market-based reforms probably won't work. Massachusetts has a mandate and, regardless of the outcome of the Supreme Court case, they can stay on their current path of reform, which has been very successful: 98% of the population in Massachusetts has health insurance. But if states like Utah, whose uninsured rate is stuck at 14% even after 3 years of state-led reform, want meaningful reform without a mandate, they will leave themselves with no choice but single payer or something like it," adds Hilman.

Possible Alternatives to the Mandate

UHPP is hopeful the mandate will survive intact, but *if* it goes down, the ACA will need another tool to prevent adverse selection and the death spiral—what happens when the new market becomes a magnet for older and sicker people. These options are on the table:

1. A tax *credit*. The Feds can always raise taxes by some small amount and then give back a credit to those who purchase insurance.
2. A waiting period for those who opt out of the system. People may be more likely to buy insurance if they thought they might get sick during the waiting period.
3. Charge a penalty for those who wait before buying insurance.

The mandate works better than any of these perfectly constitutional measures, as we know from Massachusetts' experience. According to UHPP's counterpart in Massachusetts, Health Care for All, "The individual mandate was calmly accepted as a proper tradeoff for extending coverage to everyone."

Today's discussion moves to 2 issues: *severability* – i.e., what happens to the rest of the law if the individual mandate is overturned – and the constitutionality of the Medicaid expansion. “Though not expected from legal precedents, a ruling in favor of severability will affirm the mandate provision as a state option,” says Hilman. “What we will see is a return to a brand of federalism that clearly has failed to fix the health care system. Some states will impose their own mandate, following in Massachusetts’ footsteps. Other states will follow in Utah’s footsteps, achieving [doubtful results](#).”

“For many years states, including Utah, have been the laboratories for reforms without a mandate,” Hilman states. “And those experiments have demonstrated, time and time again, that the mandate *is* a structural necessity.

Drawing less media attention, but of great interest to state policymakers, is the lawsuit’s challenge to the Affordable Care Act’s (ACA) expansion of Medicaid – the federal/state health care program that serves primarily pregnant women, children, people who are elderly, and people with disabilities. The ACA would extend Medicaid coverage to more parents and adults without children – i.e. Utahns with incomes just over \$14,000 a year.

“In their take-no-prisoners approach to the ACA, Utah and other states in the lawsuit challenging the Medicaid expansion want the Court to deny them the deal of the century,” says Jason Cooke, Medicaid Research and Policy Director for UHPP and former Texas Medicaid Director. “Utah’s political leaders would rather see tens of thousands of Utahns continue to get the most expensive care possible in our emergency rooms. They’d rather see the health care system pass on those costs to privately insured Utahns through higher premiums, than accept 100% federal funding for Medicaid coverage for the first three years of reform,” adds Cooke. After year 3 of federal reform the Federal government will pick up a full 90% of those costs.

Part of Utah’s argument before the Supreme Court is that the state is being forced to accept the Medicaid expansion elements of the ACA. The federal funding is so generous, the state says, it amounts to unconstitutional coercion. “Surely our political leadership does not mean to imply that an offer of less money to expand Medicaid would be acceptable,” Cooke muses. “That just doesn’t sound like Utah common sense, but it is the only logical conclusion you can reach based on state’s argument.”

“It’s important that Utah have a robust public conversation about our differing philosophies around health care and who pays for it,” says Cooke. “But at the end of the day, our public officials have to be ready to make practical, responsible decisions about how to help people get and stay healthy and how to pay for that. There is nothing practical or responsible about saying ‘no’ to the return of our federal tax dollars to Utah.”

UHPP has people available to speak with reporters about how their lives will be touched by the contested provisions of the ACA:

1. *Bobbi Mathews (insurance failed this family when hit lifetime cap and became uninsurable and so had to turn to Medicaid leaving taxpayer with a hefty bill: <http://www.healthpolicyproject.org/SBBobbi.html>*
2. *Christine Cardamon, an uninsurable woman who became a broker to help others in her situation: http://www.healthpolicyproject.org/Publications_files/Storybank/ChristineC.pdf*
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