

# Health Care in Motion

Timely, Substantive Updates on Policy Shifts · Actionable Advocacy to Protect Health Care

November 3, 2020

## What's at Stake in the Courtroom?: Health Care Litigation Round-Up

Today, voters across the country are casting their ballots—many with the future of health care on their minds. The election will not only determine the ways in which health care laws, like the Affordable Care Act (ACA), will be interpreted over the next four years, but it will also determine the approach our federal government takes in addressing public health emergencies, rising health care costs, and discrimination in our health care system.

Much of recent health care litigation has been tied to executive action in the last four years. In this installment of *Health Care in Motion*, we provide a round-up of current litigation efforts in the health care space – both cases that threaten our health care system and cases that try to protect it. This broad range of health care-related cases underscores not only the importance of the courts, but of the executive and legislative branches that are all too often implicated in these cases.

### The Affordable Care Act Reaches the Supreme Court (Once Again)

Over ten years and many attempts by state and federal officials to undercut the health care law later, the ACA has returned to the Supreme Court and oral argument will be held next week on November 10, 2020 in [California v. Texas](#).

*California v. Texas* follows a landmark decision from 2012: [NFIB v. Sebelius](#). In this contentious 5-4 decision, Chief Justice Roberts, writing for the majority, held the ACA's individual mandate (requiring individuals to purchase minimum essential coverage) was constitutional as a tax, in line with the federal government's power of taxation set forth in the U.S. Constitution. Because the Court determined the individual mandate to be constitutional, it did not reach the question of severability—whether the entire health care law would have to be struck down if the individual mandate was ruled unconstitutional.

Notably, the composition of the Supreme Court has changed dramatically since 2012 and the issue of severability has now taken center stage. A group of Republican state attorneys general filed a complaint arguing that the Tax Cuts and Jobs Act (TCJA) of 2017 rendered the individual mandate unconstitutional. Congress had reduced the tax of the individual mandate to zero, meaning that the individual mandate no longer raises revenue and can no longer be protected as a tax.<sup>1</sup> The complaint then goes on to argue that the individual mandate is “the heart of the ACA” and inseparable from the rest of the law, thus the entire ACA must be declared unconstitutional.

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<sup>1</sup> Brief of Petitioner at 2, *Texas, et al., v. U.S. et al.*, 352 F.Supp.3d 665(2018) (4:18CV00167).

The case went up to the Fifth Circuit before a panel of three judges. The Fifth Circuit [affirmed](#) the lower court's holding that the ACA, as amended by the TCJA, was no longer a legitimate exercise of Congress' taxing power when the penalty was reduced to zero. Although the Fifth Circuit held the individual mandate was now unconstitutional, it remanded the case to the district court on the issue of severability, imploring the district court "to employ a finer-toothed comb on remand and conduct a more searching inquiry into which provisions of the ACA Congress intended to be inseparable from the individual mandate." In January of 2020 the Fifth Circuit denied a request for a larger hearing with the entire Fifth Circuit and on March 2, 2020 the Supreme Court agreed to hear the case.<sup>2</sup>

## What Can We Expect from a Changed Court?

With Justices Kennedy, Scalia, and Ginsburg no longer on the Supreme Court, the fate of the ACA is difficult to predict. One vote (Justice Ginsburg) from the ACA-saving majority is gone. Justice Ginsburg's replacement, Justice Amy Coney Barrett, [wrote in 2017](#) that "Chief Justice Roberts pushed the Affordable Care Act beyond its plausible meaning to save the statute." Also worth noting, however, is that Justice Kavanaugh recently authored a [majority opinion](#) in which he embraced the "strong presumption of severability" when one portion of a law is held unconstitutional. Another clue as to Justice Kavanaugh? In 2011, when he sat on the D.C. Circuit, Justice Kavanaugh authored a [dissent](#) to a challenge to the Affordable Care Act's individual mandate arguing that the federal courts did not have jurisdiction to hear the case. Although his dissent turned on an analysis of the Anti-Injunction Act (noting that the court would have jurisdiction after the mandate went into effect), it hints that Justice Kavanaugh may be more reluctant than some of his conservative colleagues to strike the law down.

### *California v. Texas: What's at Stake?*

With three new justices on the Court, *California v. Texas* hangs in the balance and is one of the most important cases on the docket. The ACA insures more than [22 million Americans](#) and with an ongoing pandemic reliable health insurance is [more important than ever](#). States that have expanded Medicaid (an option provided by the ACA) have been [better equipped](#) to address COVID-19, especially among essential workers. The pandemic has exacerbated health disparities especially among low income workers and recent data indicates ["the uninsured rate for low-income people with these \[essential worker\] jobs was about twice as high in non-expansion states than in expansion states."](#)

## The Election Implicates Health Care Litigation in More Ways than One

While President Trump has [indicated](#) he will go to court to contest the election, the upcoming presidential election will likely have other effects on the Supreme Court's docket. Many cases seeking *cert.* could be [rendered moot](#) if there is a change in administration because there is a lot of Trump-centric litigation right now. For example, one [petition](#) that could be rendered moot by the election is [Azar v. Gresham](#), a case concerning work requirements for Medicaid recipients in Arkansas. The D.C. Circuit invalidated the Department

<sup>2</sup> The Supreme Court will consolidate petitions and cases for oral argument when they are related or touch on the same issue. Here, the federal defendants of the original lawsuit agreed with the plaintiffs that the ACA was unconstitutional. In 2018, the California Attorney General and sixteen other attorneys general filed a motion to intervene in the lawsuit and defend the ACA. Their appeal of the Fifth Circuit's decision regarding the constitutionality of the individual mandate has been consolidated with the Texas Attorney General's appeal of the severability decision. Documents filed in these cases are filed under "California v. Texas" and the appeals will be heard in one oral argument.

of Health and Human Services' (HHS) approval of the work requirements and a new administration could simply rescind this approval, rendering the case moot.

## The Rollback of Nondiscrimination Protections

In addition to *California v. Texas*, the Affordable Care Act is embroiled in federal litigation surrounding the Trump administration's "[Rollback Rule](#)" which revised HHS' prior interpretation of the nondiscrimination provision of the ACA (Section 1557). [As we discussed in June](#), this rollback poses a significant threat to the health care rights of transgender and gender non-conforming people. Section 1557 prohibits health care discrimination on the basis of race, color, national origin, sex, age, or disability. The Obama administration had interpreted Section 1557's incorporation of Title IX, which prohibits sex-based discrimination, to extend protections against discrimination on the basis of sex stereotyping or gender identity.

In line with a number of other Trump-era rules repealing protections for transgender and gender non-conforming people, the Trump administration rolled back the Obama-era rule in June 2020 and removed explicit protections against discrimination on the basis of gender identity and sex stereotyping (among other protections). Ignoring the Supreme Court's recent ruling in [Bostock v. Clayton County](#) which held that a sister non-discrimination statute (Title VII of the Civil Rights Act) protects individuals from workplace discrimination on the basis of sexual orientation and gender identity, the Trump administration promptly issued this Rollback Rule, interpreting Section 1557 to not extend protections to those who are discriminated against due to sex stereotyping, their gender identity, or their sexual orientation. Advocacy groups around the country filed suit.

- In [Walker v. Azar](#), Judge Block of the United States District Court for the Eastern District of New York issued a stay on the 2020 repeal of the 2016 definition of discrimination on the basis of sex. Judge Block requested further briefing from the parties to determine how much of the Rollback Rule should be stayed. Last week, he ruled that the stay applied to (1) the repeal of definitions for "on the basis of sex", "gender identity", and "sex stereotyping" and (2) the repeal of a particular section that requires health care providers to treat individuals consistent with their gender identities and to not deny or limit a patient's access to sex-specific care because they are transgender. The government is set to appeal.
- The plaintiffs in [BAGLY v. HHS](#) (supported by CHLPI) filed an amended complaint in September, arguing that the Rollback Rule "manifests a disregard for the intent of the law and the weight of contrary legal authority." The Trump administration has filed a motion to dismiss and Judge Saris of the United States District Court for the District of Massachusetts is set to hear arguments on January 26, 2021 at a virtual hearing.
- In [Whitman-Walker Clinic v. HHS](#), Judge Boasberg of the United States District Court for the District of Columbia issued a preliminary injunction on some of the Rollback Rule's provisions, including the enforcement of the "repeal of the 2016 Rule's definition of discrimination '[o]n the basis of sex'" and the enforcement of incorporating religious exemptions from Title IX. The government is set to appeal.

## Other Cases to Keep an Eye On

### *SCOTUS Justices Threaten Obergefell on Second Day of October Term*

At the beginning of this October term, the Supreme Court declined to hear a case involving Kim Davis, the former Kentucky county clerk who refused to issue marriage licenses in the wake of *Obergefell v. Hodges*, the 2015 case that recognized the right to same-sex marriage. Published alongside the denial to hear the case was a [concerning](#)

[opinion](#) from Justice Thomas, joined by Justice Alito. In it, Justice Thomas criticizes the *Obergefell* precedent, writing that in recognizing the constitutional right to same-sex marriage “the Court has created a problem that only it can fix.”

### ***Discriminatory Adoption Agencies Get New Day in Court***

A Christian adoption agency in New York sued the New York Office of Children and Family Services (OCFS), alleging a regulation prohibiting adoption agencies from discriminating on the basis of sexual orientation and marital status violated the Free Exercise, Free Speech, and Equal Protection Clauses of the Constitution. The district court dismissed the case, but in July the Second Circuit [reversed and remanded](#) the case back to the district court, concluding that the adoption agency had raised plausible claims under the Free Exercise and Free Speech clauses. A similar case, [Fulton v. City of Philadelphia, Pennsylvania](#), came out differently in the Third Circuit and was appealed up to the Supreme Court. The Supreme Court will hear oral argument for *Fulton* tomorrow on November 4th.

## **Next Steps**

### ***Vote!***

If you are a registered voter and haven't already voted in today's election, make a plan to vote! Make sure you leave yourself enough time to safely vote at your polling location and consider how your vote can impact the future of health care rights in this country.

### ***Listen to Oral Arguments!***

The COVID-19 pandemic caused the Supreme Court to begin hearing oral arguments by telephone conference for the first time back in March. The Court recently announced it will continue to hear oral arguments via telephone through November and December. The Court has been livestreaming these oral arguments, giving advocates unique access to the process. Make sure to tune in on November 4 for *Fulton v. City of Philadelphia* and November 10 for *Texas v. California*.

### ***Engage on Social Media!***

If the Supreme Court takes this opportunity to strike down the Affordable Care Act, it would be a devastating blow to health care. Over 20 million Americans [would likely be uninsured](#). The Supreme Court needs to know exactly what is at stake. Take this opportunity to encourage your coalitions and stakeholders to take to social media and share what the ACA means to them.

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