



## Judge notorious for anti-Obamacare rulings has another crack

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A Texas-based judge who has become notorious for his [rulings against the Affordable Care Act](#) under the Trump and Obama administrations now has a chance to take another whack at the law.

In several different cases spanning the last half-decade, US District Judge Reed O'Connor -- an appointee of President George W. Bush -- has issued opinions that would dismantle key Obamacare provisions.

On Friday, President Joe Biden's Justice Department will join the administrations of his predecessors in asking O'Connor to reject the latest legal attack against the landmark 2010 health care law.

The case targets the law's requirements that insurers cover certain preventive care services, like STD testing, vaccines and PreP drugs for HIV. The challengers are making religious freedom claims as well as constitutional separation-of-powers arguments -- both issues known to be of interest to the Supreme Court's conservative majority.

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The lawsuit doesn't pose the existential threat to the Affordable Care Act that previous anti-Obamacare cases presented. But it is still an example of "never-ending litigation" around the Affordable Care Act, said John Cogan, a health law professor at University of Connecticut School of Law.

"There are plaintiffs who simply will not give up, despite years of defeats," Cogan said. "They've had some successes, but years of defeats, and there's just no lack of an appetite for continuing litigation."

Where the challengers have been successful, it's often been in O'Connor's courtroom.

"The whole approach to challenging the ACA ... he's their guy," Cogan said.

A judge with a history of ruling against the Affordable Care Act

Judge O'Connor presided over the last major Obamacare challenge to land on the Supreme Court's doorstep. In that case, he signed on to an aggressive argument -- scoffed at even by legal commentators on the right -- that was ultimately rejected by four of the Supreme Court's conservatives in addition to its three liberals.

His ruling was handed down on a Friday evening a week and a half before Christmas in 2018.

The Supreme Court in an opinion written by Justice Stephen Breyer disagreed with O'Connor's conclusion that by reducing the ACA's individual mandate penalty to zero, Republicans in Congress had made the mandate -- and therefore the rest of the law -- unconstitutional. Breyer is now retiring, and if this latest case makes it before the Supreme Court, among the justices who will likely be hearing it is Biden's nominee for the vacancy.

In addition to the individual mandate case, O'Connor also sided with Obamacare challengers who took aim at the law's non-discrimination provisions, its contraceptive coverage requirement, and at insurance provider fees imposed on states through the law.

That he's been a go-to judge for Obamacare's legal opponents appears to be a product of how federal courts in Texas divvy up their cases.

Though the Northern District of Texas has a dozen active judges, O'Connor is just one of two active judges (plus a third judge who is on senior status) tasked to hear cases that are filed in the Fort Worth Division. That means filing a case there gives plaintiffs a very decent shot of their case going to him.

He also recently ruled against the military's Covid-19 vaccine mandate and has in the past issued decisions against policies that expanded LGBT rights.

"He is bold," said Joshua Blackman, a professor at the South Texas College of Law Houston and an adjunct scholar at the libertarian Cato Institute. "He doesn't blanch at a suggestion that a major law is unconstitutional. If he thinks something's valid, he'll stop it."

The case before O'Connor now was filed in March 2020. It was brought by by several Texas individuals and two employers, including a company linked to a well-known GOP activist in the state.

The lawyer for the plaintiffs is Jonathan Mitchell, a conservative attorney who has been in the spotlight recently for his role in designing Texas' six-week abortion ban. A legal group led by

former Trump White House aide Stephen Miller and other allies of the former President is also now involved in the case.

Under the Trump administration, the Justice Department put up a full defense of the challenged provisions and unsuccessfully sought to get the case dismissed. The Justice Department filing due Friday will mark the first time that the Biden administration gets to make its comprehensive legal arguments against the claims brought in the case.

A case with the 'potential to really limit or unwind agency power'

The lawsuit lobs several different arguments at the preventive services coverage mandate.

Perhaps the most novel assertion is a claim that the bureaucratic advisers who decide which services are covered under the law lack the authority to do so. The lawsuit argues that because those officials weren't appointed by the President and confirmed by the Senate, their determinations violate the Appointments Clause.

The lawsuit singles out coverage mandates for STD testing and HIV treatments as the challengers say those treatments are not ones they or their families will ever want or need.

But the services designated under ACA's preventive care requirement cover a whole host of treatments, including colonoscopies, mammograms, cholesterol checks, vision screening for kids, well-woman and well-child visits and lots of other non-controversial screenings and immunizations.

Additionally, the challengers claim that, under the so-called nondelegation doctrine, the law violates the Constitution by delegating those decisions to a task force of experts selected by the US Department of Health and Human Services, because Congress allegedly lacked specificity in its instruction.

"So much of our health care system is built around agency determinations -- this case has the potential to really limit or unwind agency power," Zack Buck, a University of Tennessee College of Law professor who specializes in health law.

The lawsuit also appears poised to push conservative judges like O'Connor on how far they'll go in the wake of the Supreme Court's Hobby Lobby ruling, a 2014 decision that sanctioned a carveout from contraceptive coverage requirements for religious objectors.

The challengers in the current case claim that ACA preventive care mandates violate a religious freedom law called the Religious Freedom Restoration Act. They allege the coverage mandates are requiring individuals and employers to subsidize insurance for treatments that HIV drugs and STD testing that "facilitate and encourage homosexual behavior, prostitution, sexual promiscuity, and intravenous drug use."

The combination of arguments about religious freedom and executive branch authority is a "double-whammy," Blackman said. He predicted the lawsuit will get a "lot traction" both with O'Connor and the conservative 5th US Circuit Court of Appeals, which would be next to hear the case if it's appealed.

The stakes are big for the questions around agency power and administrative law. They're smaller for the Affordable Care Act, legal experts said. But a win for the challengers, if upheld by higher courts, may cause some disruption to the health care markets. How much the markets are undermined would depend on whether -- without the mandates -- insurers would actually offer skimpier policies that don't cover those services.

"In terms of long-term stability of the Affordable Care Act, I don't see this as a major threat," Buck said. "But of course, it matters individuals who depend upon this care."