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Latest Obamacare Fight Aims to Revive 87-Year-Old Line of Attack

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- Lawsuit attacks popular ACA benefit
- Environmental case could provide litmus test

Free birth control, colonoscopies, and vaccines have helped convince millions of people to sign up for Obamacare coverage.

But now conservatives are trying to revive an arcane legal principle, one not entertained by the U.S. Supreme Court in more than 80 years, to argue the government has no right to require insurers to fully cover preventive services. They may have a slate of judges lined up who agree.

The dispute is before U.S. District Judge Reed O'Connor, the same judge in Texas who ruled the Affordable Care Act was unconstitutional in 2018 before the Supreme Court voted for a second time to uphold it. Legal scholars expect the case to be appealed to the U.S. Court of Appeals for the Fifth Circuit, which is stacked with Republican-appointed judges, and then to the Supreme Court regardless of how it shakes it out.

Though the entire law isn't at risk of being overturned this time, legal scholars say one of the ACA's most popular provisions is. If it's eliminated, people enrolled in Obamacare plans may have to pay copays, deductibles, or even full price for routine screenings like mammograms.

"There's a fair amount of research that shows when cost-sharing is eliminated people use preventive services more, and there's a lot of research that shows that preventive services in fact are good for people, keep people healthier, identify diseases earlier," said Timothy Jost, an emeritus professor at Washington and Lee University School of Law who was part of a friend-of-the-court brief filed in support of the government.

Legislative Power

The challengers argue the ACA unconstitutionally lets a federal agency, advisory committee, and lone task force decide what preventive services and screenings insurers have to cover, without any guardrails on that decision making.

The law directs insurers to cover evidence-based items or services recommended by the U.S. Preventive Services Task Force (PSTF); any vaccines recommended by the Centers for Disease Control and Prevention’s Advisory Committee on Immunization Practices (ACIP); and any screenings for women, infants, and children recommended by the Health Resources and Services Administration (HRSA).

An administrative law principle, known as the non-delegation doctrine, says Congress can’t delegate its legislative powers to other agencies without providing an “intelligible principle” to guide the agencies’ discretion.

“The basic issue with delegation is, did Congress provide the agency with sufficient direction or is the agency doing something that greatly exceeds what Congress has delegated?” said Josh Blackman, a professor at the South Texas College of Law Houston and adjunct scholar at the Cato Institute, a libertarian think tank in Washington, D.C.

The Department of Health and Human Services argues Congress provided ample guidance in the ACA and that the court “should not enjoin a statutory provision on the basis of predictions about what the Supreme Court will do in the future.”

The case was first filed in 2020 but O’Connor could soon decide which party wins. Briefing is scheduled to wrap up in the beginning of May and a decision could come this summer.

Supreme Court Shift?

The Supreme Court has only found excessive delegation twice, and both of those instances were in 1935. In each case it was because “Congress had failed to articulate any policy or standard” to confine discretion.

But Justices Clarence Thomas, Neil Gorsuch, Samuel Alito, and Brett Kavanaugh have all signaled a willingness to take a hard look at the constitutionality of statutes that delegate legislative powers to agencies. The justices heard a case this term against the Environmental Protection Agency and its power under the Clean Air Act to set new limits on carbon emissions.

“If the court in the EPA case goes ahead and rules in favor of the West Virginia plaintiffs, that suggests that other courts can rely on the non-delegation doctrine in other contexts,” Blackman said.

“So for all we know the Reed O’Connor opinion will depend in part on what happens in the West Virginia vs. EPA case. That will be a very significant litmus test for where the Supreme Court’s going on delegations.”

This latest challenge to Obamacare before O’Connor was brought by six individuals and two small businesses that all want cheaper health insurance that doesn’t cover contraceptives or pre-exposure prophylaxis (PrEP) medicines, which are taken to prevent HIV. They argue they either don’t need these drugs or have a religious or moral objection to paying for them.

They’re being represented by America First Legal Foundation, a nonprofit led by senior members of President Donald Trump’s administration, including Trump senior adviser Stephen

Miller and Gene Hamilton, who served as counselor to the attorney general. Their lead attorney is Jonathan Mitchell, a legal powerhouse for the right who helped craft the Texas abortion law that was designed to evade judicial review by leaving enforcement to private citizens instead of government officials.

While their main objection is to sexual related products, their arguments have the potential to eliminate the no-cost guarantee for a host of preventative care services. Blackman said the court could decide not to kill the entire delegation and instead say contraceptives and PrEP are different because they affect religious freedom.

There is another claim, he said, that could wipe out the entire list of preventive care services insurers must now cover at no cost.

Issue to Watch

The litigation also claims the members of the agency, advisory committee, and task force deciding what insurers cover were never appointed and confirmed by the Senate—and therefore have no authority to make these decisions.

“It’s less of a problem for sure on ACIP, which is under the CDC and clearly under an executive branch,” said Katie Keith, director of the Health Policy and the Law Initiative at Georgetown Law’s O’Neill Institute. “HRSA is under HHS. I think the one they’ve been making a lot of hay over is the U.S. Preventive Services Task Force, which is a group of volunteer experts.”

That, she said, could be more of an issue, but she noted HHS Secretary Xavier Becerra ratified the guidelines and recommendations from all three groups.

“There shouldn’t be an appointments clause issue here because the government is in charge and he signed a document that said we ratified all these things to make it extra clear that the secretary of HHS was incorporating all this stuff,” she said.

Because O’Connor was sympathetic to the challengers’ arguments at an earlier juncture in the case, Blackman said there’s a good shot he rules in their favor at least in part.

The case is Kelley v. Becerra, N.D. Tex., No. 20-cv-00283.