HealthAffairs

ACA Litigation Round-Up: Part I

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The Supreme Court recently ended its 2019 term, which included two Affordable Care Act (ACA) decisions and several other decisions with implications for ACA cases. Briefing in *California v. Texas* is ongoing and will be heard later this fall, with a decision expected in 2021. Beyond the Supreme Court, there are many ACA-related legal challenges pending at appellate and district courts across the country.

This post summarizes the recent Supreme Court decisions and the latest in *California v. Texas*. A second post will discuss the status of long-standing ACA-related lawsuits and highlight newer lawsuits over ACA implementation. A third post will focus on the resolution of lawsuits over unpaid risk corridors payments.

Supreme Court Happenings

Health policy watchers know the Supreme Court issued two major ACA decisions in its recently ended 2019 term: *Maine Community Health Options v. United States* and *Little Sisters of the Poor v. Pennsylvania*. Both decisions have major implications for insurers and consumers and have been covered at length at the *Health Affairs* Blog. A third decision, *Bostock v. Clayton County, Georgia*, will affect the Trump administration's attempt to roll back nondiscrimination protections for LGBT patients and strengthens legal challenges to the recently issued final rule on Section 1557 of the ACA. The Court also issued two decisions that, while unrelated to the ACA, were consistent with prior precedent on severability, which has implications for a future Court ruling in *California v. Texas*.

The Court has also been asked to hear *Gresham v. Azar*, a dispute over the validity of Medicaid work requirements. The district court set aside state Medicaid waivers with work requirements. That decision was affirmed by a unanimous panel of the Court of Appeals for the District of Columbia in a decision written by Judge David Sentelle. The attorney general of Arkansas and the Trump administration filed *cert* petitions on July 13. If four Justices vote in favor of hearing the appeals, *Gresham* will be added to the list of cases to be decided in the Court's 2020 term.

Risk Corridors Payments

In *Maine Community Health Options*, the Court issued an 8-1 decision concluding that insurers were entitled to more than $12 billion in unpaid risk corridors payments. There are at least five dozen lawsuits, including two class actions, over these payments pending before the lower courts. As noted, a separate post will summarize the status of many of those cases following the Supreme Court's decision.

Contraceptive Mandate

In *Little Sisters*, the Court issued a 7-2 decision upholding two Trump-era rules that allow religious and moral exemptions to the ACA's contraceptive mandate. The Court vacated the prior nationwide injunction by a federal judge in Pennsylvania and remanded the case to the lower courts. The next day, the Court separately remanded an appeal of a similar injunction by a California federal judge from the Ninth Circuit Court of Appeals. Although the Trump administration, Little Sisters, and the March for Life Education and Defense Fund had separately appealed the Ninth Circuit decision, the Court had not taken action on those appeals while *Little Sisters* was pending and quickly remanded those challenges.

The Court in *Little Sisters* held that the federal government had the authority to adopt broad exemptions under the ACA but did not rule on whether the rules are arbitrary and capricious under the Administrative Procedure Act. The question is whether the broad exemptions, without a mandatory accommodations process, fail to balance women's health and access to contraceptives with religious freedom in a way that complies with the Court's precedent. The answer may very well be that the rules are arbitrary and capricious, which was suggested by Justices Breyer and Kagan. Chief Justice Roberts also expressed skepticism during oral argument that the Trump-era rules do not adequately balance religious liberty and women's health care access as the Court directed in *Zubik v. Burwell*.

Because the litigation will continue, the parties in Pennsylvania filed a joint status report before the district court on July 17, noting that they intend to submit a plan for how to proceed with additional briefing seven days after the Third Circuit remands the case to the trial court. The parties in California also filed a joint status report on July 17, noting that supplemental briefing is needed to address the impact of *Little Sisters* on the case. The parties intend to propose a supplemental briefing schedule within five business days of remand by the Ninth Circuit.

Little Sisters also has implications for other pending litigation in *DeOtte v. Azar* (a lawsuit over the Obama-era rules pending before the Fifth Circuit Court of Appeals) and *Irish 4 Reproductive Health v. HHS* (a lawsuit over the Trump-era rules and a settlement agreement pending before a district court in Indiana). Both had been stayed pending a decision in *Little Sisters*, and status reports are expected soon.

Timing of *California v. Texas* And Severability

Briefing continues in *California v. Texas*, a global challenge to the entire ACA that has been covered in prior posts. When we last checked in on *Texas* in late June, a Texas-led coalition of 18 Republican states, two individuals, and the Trump administration had filed opening briefs arguing that the entire ACA should be declared invalid. This had followed opening briefs by a California-led coalition of 21 Democratic states and the U.S. House of Representatives plus nearly 40 amicus briefs in support of upholding the ACA. Since then, six amicus briefs were filed in support of the Texas-led coalition and the two individuals, joined by the Trump administration. This includes briefs from the Cato Institute and the Center for Constitutional Jurisprudence.

Briefing will continue through the summer. California and the House will file a second round of briefs on July 29, and Texas will file a limited reply brief on August 18. In the meantime, there have been a series of filings regarding who can participate in yet-to-be-scheduled oral argument

and how long oral argument will be. The Court has currently approved a total of one hour for argument.

On June 30, the Republican attorneys general of Ohio and Montana asked to participate in oral argument with 10 minutes to present their position that the penalty-less individual mandate is unconstitutional but fully severable from the rest of the ACA. If granted, their argument would focus on severability, urging the Court to ground its severability analysis in the statute's text rather than congressional intent. They would ask the Court to look at whether the ACA operates after parts of it are invalidated and uphold the rest of the law as severable from the mandate.

Then, on July 2, the House asked that the Court extend the total argument time for California from 30 to 40 minutes, with 10 of those minutes for the House. (The other side would also get 40 minutes.) The House cites its unique institutional interest in defending a law's constitutionality when the executive branch declines to do so. Because the Trump administration is not defending the ACA, the House would be the only federal party to do so and could speak to the law's federal interests and congressional intent. Texas opposes the House's participation in oral argument.

The Trump administration opposes the House's request for additional time but would not oppose the divided oral argument. The government itself asks for half of the plaintiffs' 30 minutes of total time during oral argument. Finally, the Trump administration opposes the request from Ohio and Montana for extended argument because the existing parties will fully represent those positions at argument.

Regardless of how the argument is divided among the parties, oral argument will not be held until the fall of 2020. At this point, it seems unlikely that a hearing will occur before the election on November 3. This is because the Court pushed some cases from its 2019 term to the 2020 term because of COVID-19. Unsurprisingly, the Court scheduled those arguments first and has already filled the Court's oral argument schedule for October 2020.

While it remains *possible* that the oral argument in *Texas* could be scheduled during the four time slots on November 2nd or 3rd (i.e., before or on election day), the Court agreed to hear at least three other cases before it agreed to hear *Texas*, suggesting those cases might be scheduled first. Regardless of the schedule, oral argument is expected this fall. A decision in *Texas* will not be issued until 2021.

Looking Ahead On Severability

Two of the Court's major decisions this term addressed severability, and in both cases majorities of the Court voted to strike one part of the law in question but uphold the rest of the statute. Both underlying statute had an explicit severability clause (which the ACA does not have). But the Court noted the strong presumption of severability even without an explicit severability provision. Both laws—like the ACA—remained capable of functioning independently without the offending provision.

In *Seila Law v. Consumer Financial Protection Bureau*, the Court struck down restrictions on removing the director of the Consumer Financial Protection Bureau but upheld the rest of the law creating the agency. Writing for the majority, Chief Justice Roberts focused on Congress's intent and whether the law's text or historical context made it evident that Congress would have preferred no statute at all. He also noted that striking down the Bureau would cause "a major regulatory disruption and would leave appreciable damage to Congress's work in the consumer-

finance arena." As he put it, the Court should "use a scalpel rather than a bulldozer" in curing constitutional defects.

In *Barr v. American Association of Political Consultants (AAPC)*, the Court struck down a statutory exception (that allowed government debt, but not other debt, to be collected through robocalls to cell phones) under the First Amendment. But seven Justices agreed that the statute was severable from the Telephone Consumer Protection Act of 1991. Justice Kavanaugh, writing for the majority, noted the Court's "decisive preference for surgical severance rather than wholesale destruction" and that "constitutional litigation is not a game of gotcha against Congress, where litigants can ride a discrete constitutional flaw in a statute to take down the whole." Although Justice Gorsuch, joined by Justice Thomas, took issue with the majority's severability analysis, Justice Kavanaugh described the Court's approach as "constitutional, stable, predictable, and commonsensical."

A range of observers believe that these cases bolster the belief that the Court will invalidate the individual mandate but sever the rest of the ACA.