

# Covering the Care: Legal Update

## December 2020

### NEW HAMPSHIRE'S HEALTH IN FEDERAL COURTS

Courts are deciding cases impacting how we access health care and insurance in New Hampshire. This Legal Update summarizes key health care cases including challenges to the Affordable Care Act, Medicaid work and community engagement requirements, due process rights for people with acute mental illness, state authority to regulate pharmacy benefit managers, and access to reproductive health.

- Is the Affordable Care Act Constitutional? Redux!- *California v. Texas* (SCOTUS)
- New Hampshire Medicaid's Work and Community Engagement Requirements – The Story Continues!- *Philbrick v. Azar* (SCOTUS)
- Due Process for Patients in Acute Mental Health Emergencies - *John Doe et al. v. Commissioner NH DHHS* (USDC NH) and *Jane Doe v. Commissioner* (NH Supreme Court)
- State Regulation of Pharmacy Benefit Managers - *Rutledge v. Pharmaceutical Care Management* (SCOTUS)
- Access to Reproductive Health Care - *June Medical Services LLC v. Russo* and *Planned Parenthood of Greater Texas v. Kauffman* (5th Circuit, 11/23/20)

### IS THE AFFORDABLE CARE ACT CONSTITUTIONAL? REDUX

#### *California v. Texas, United State Supreme Court*

The Patient Protection and Affordable Care Act (ACA) is once again being challenged before the Supreme Court of the United States (SCOTUS) in the case of *California v. Texas*, with oral arguments held on November 10 - just one week after the 2020 Presidential election. Texas and nineteen other states brought the challenge, arguing Congress's authority to penalize individuals if they fail to have "minimum essential" health insurance no longer exists. The individual insurance mandate, therefore, is unconstitutional and the entire ACA should be struck down.

This case has been politicized due to the election, the importance of health insurance to families during the COVID-19 pandemic and the death of Supreme Court Justice Ruth Bader Ginsburg. The confirmation of her replacement, 11th Circuit Court of Appeals Judge Amy Coney Barrett, puts the high court's ACA majority at risk.

On May 13, 2020, New Hampshire joined Maryland, Maine, New Mexico, Pennsylvania and Wisconsin in filing a 'friend of the court' or *amici curiae* brief in support of the California petitioners and the ACA as "States whose healthcare systems and residents have benefitted from and continue to depend on provisions of the challenged legislation."<sup>1</sup>

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*"Given the challenges we face, the complexity of the health care markets and the fragility of our state fiscal conditions, invalidating these [ACA] provisions would be catastrophic for the States and our citizens." Amicus Brief of NH*

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NH and the other states filed their brief to:

*"...illustrate... just how integral the ACA has become to the States' efforts to maintain and improve health care systems for the protection of public health. Even before the arrival of the Nation's worst health crisis in over a century, preservation of the ACA's various invaluable forms of support, incentives, and safeguards had become crucial, not only for the amici States, but for every State in the Union. Now as the States and our residents face the COVID-19 threat, losing the ACA has become unthinkable."*

## The ACA's History with the Supreme Court

Ten years ago, after years of negotiations, Congress passed a sweeping and comprehensive health insurance plan "to increase the number of Americans covered by health insurance and decrease the cost of health care." *National Federation of Independent Businesses v. Sebelius (NFIB)*. We call this legislation the Patient Protection and Affordable Care Act, or "The ACA".

*California v. Texas* is the first case testing the constitutionality of the ACA to reach the Supreme Court since the Court upheld the ACA by a slim 5-4 margin in the 2012 decision, *National Federation of Independent Business v. Sebelius*. Chief Justice Roberts surprised many by siding with the majority and upholding the ACA's "individual mandate." The individual mandate was intended to encourage young, healthy individuals to enroll in healthcare insurance to help stabilize the insurance risk pool. While rejecting traditional theories of Congressional authority, he explained that the individual mandate is enforced through a "shared responsibility payment," giving individuals the choice to enroll in health insurance or risk a tax penalty. Because Congress has the power to tax, he reasoned, the individual mandate is constitutional.

The Supreme Court supported the ACA again in the 2015 case of *King v. Burwell* where a few residents of Virginia focused on obscure language in the ACA which they argued should prohibit anyone from receiving insurance subsidies through an individual insurance marketplace that was not a "state based exchange." The Supreme Court, in a 6-3 decision, again rejected the challenge and ruled that ACA health insurance plan subsidies may be distributed to all economically eligible individuals, whether they purchased their insurance through the federal marketplace or a state exchange.<sup>2</sup>

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

The ACA looks different now than it did in 2012. The "shared responsibility" payment was reduced to \$0 by the Tax Cuts and Jobs Act (TCJA) signed into law by President Trump in 2017. As a result, beginning in January 2019, Americans who choose to forego health insurance no longer pay a penalty.

Almost immediately, a group of twenty states, led by Texas, brought suit in federal court asserting that without the individual mandate penalty, the mandate was unconstitutional and no longer fairly readable as an exercise of Congress's Tax Power:<sup>3</sup>

*"The savings construction utilized by the Court in NFIB to construe the mandate as a tax no longer applied, thus leaving the mandate as an unconstitutional command to participate in commerce by purchasing insurance."<sup>4</sup>*

Judge O'Connor agreed and invalidated the entire ACA finding that the individual mandate is inseverable from the law's remaining provisions. The Fifth Circuit Court of Appeals quickly agreed in part and sent the case back to the District Court in Texas to better analyze whether the mandate was severable from the rest of the Act.<sup>5</sup>

On January 3, 2020, those defending the ACA, now 20 states and the District of Columbia, petitioned the Supreme Court for review of the Fifth Circuit's decision. The U.S. House of Representatives also intervened to defend the ACA. On the other side, 18 states, two individual plaintiffs and the federal government are arguing against the validity of the ACA.<sup>6</sup>

### What Did the Oral Arguments on November 10 Reveal?

The Supreme Court heard oral arguments on November 10 and seemed skeptical about whether the Texas plaintiffs were actually injured at all, given there is no longer a penalty if individuals choose not to enroll in health insurance. Based on their questions, the Justices seemed equally divided as to the constitutionality of the mandate, but unconvinced that the entire ACA should fall if the mandate itself is somehow unconstitutional.

*"Under the severability question, we ask ourselves whether Congress would want the rest of the law to survive if an unconstitutional provision were severed. ... And here Congress left the rest of the law intact when it lowered the penalty to zero. That seems to be compelling evidence on the question." Chief Justice Roberts commenting on the ACA during oral arguments on November 10, 2020.*

### How Could People In New Hampshire Be Impacted?

A Supreme Court decision invalidating the entire ACA would have broad and disruptive impacts on the health care system and access to health insurance in New Hampshire where over 40,000 people have insurance through the Marketplace and over 60,000 through NH's Medicaid expansion - the Granite Advantage Program. Thousands more are able to enroll and keep insurance because of the ACA despite pre-existing conditions or mental health and substance use disorders or because they rely on their parents' insurance.<sup>7</sup>

As New Hampshire explained to SCOTUS, we and other states have seen under the ACA a steep decline in the number of people who lack health insurance, increased quality of health insurance being sold, and generally improved health outcomes:

*"The ACA has achieved this progress through means that include expanding and improving Medicaid, instituting robust consumer protections to prohibit insurers from mistreating the sick and vulnerable, and offering families and childless adults financial assistance to buy insurance that would otherwise be unaffordable. The access to health care that these reforms ensure is vital to the States in this time of global pandemic."<sup>8</sup>*

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*"Now as the States and our residents face the COVID-19 threat, losing the ACA has become unthinkable." Amicus Brief of NH*

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## NEW HAMPSHIRE MEDICAID'S WORK AND COMMUNITY ENGAGEMENT REQUIREMENTS – THE STORY CONTINUES!

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### ***Philbrick v. Azar (SCOTUS)***

New Hampshire was one of the first states to request and receive approval for a work requirement as a condition of eligibility for Medicaid in 2018. In an unprecedented change in policy, the Centers for Medicaid and Medicare Services (CMS) approved New Hampshire's application for a demonstration waiver requiring restrictive 100-hour per month work and community engagement requirements on the Medicaid expansion population (those ages 19-64 with incomes up to and including 138 percent of the federal poverty level) as a condition of eligibility.<sup>9</sup> Beneficiaries who met a statutory exemption or good cause exception did not need to satisfy the requirements. The waiver also authorized elimination of 90-day retroactive eligibility for Medicaid.<sup>10</sup>

New Hampshire's Medicaid work and community engagement requirements began on March 1, 2019 when approximately 51,240 individuals were enrolled in New Hampshire's new Granite Advantage Program (otherwise known as Medicaid Expansion and previously named the New Hampshire Health Protection Program).<sup>11</sup> That same month, four New Hampshire Medicaid expansion beneficiaries challenged CMS's approval of New Hampshire's work and community engagement requirements in *Philbrick v. Azar*,<sup>12</sup> on behalf of themselves and others negatively impacted by the work requirements and elimination of retroactive coverage.

In July 2019, United States District Court Judge James E. Boasberg sided with the plaintiffs and rejected New Hampshire's Granite Advantage demonstration waiver, finding the work requirements to be inconsistent with the purpose of the Medicaid program. "...[T]he core objective of the Medicaid Act is to furnish health-care coverage to the needy" and that the Secretary "can only approve demonstration projects that are likely to assist in promoting the objectives of the Medicaid Act." The Secretary was faced with considerable information that coverage losses would be substantial - "the project could expel 75% of prior Medicaid beneficiaries.." - yet failed to address the magnitude of the losses. The Court, therefore, found that the Secretary's approval of New Hampshire's work requirement violated the purpose of the Medicaid program and was unlawful.

The D.C. Circuit Court agreed with Judge Boasberg:

...[T]he Secretary's failure to consider the impact of the demonstrations on Medicaid beneficiary coverage was arbitrary and capricious in violation of the APA.

On December 4, 2020, the Supreme Court agreed to hear the Trump administration's appeal of the decisions in *Philbrick* and the companion decision regarding Arkansas's requirements, which are consolidated for review. Although it is unlikely the Biden administration will support work requirements, a Supreme Court ruling upholding them could allow future administrations to continue the policy.

### **How Could People in NH Be Impacted?**

New Hampshire has seen record numbers of individuals qualifying for health insurance under Medicaid during the COVID-19 pandemic. So too the federal government has increased its share of the cost for Medicaid coverage during COVID-19.<sup>13</sup> The high rates of unemployment coupled with the economic down-turn make New Hampshire Medicaid and the Granite Advantage Program (Medicaid Expansion) critical in combatting the impacts of COVID-19 on health and mental health in New Hampshire.<sup>14</sup>

## DUE PROCESS FOR PATIENTS IN ACUTE MENTAL HEALTH EMERGENCIES

### ***John Doe v. Commissioner, New Hampshire Department of Health and Human Services (United States District Court – New Hampshire)***

Back in November 2018, the New Hampshire Civil Liberties Union (NH ACLU) filed a lawsuit in federal district court to stop the “involuntary detention” of mental health patients who are waiting in hospital emergency rooms. A patient is typically brought to a hospital when experiencing an acute mental illness where a professional may certify the patient for an involuntary emergency admission (IEA) if the patient poses a danger to themselves or others as a result of a mental illness. Once certified, patients are detained “unlawfully without due process to challenge their involuntary detention” according to the lawsuit.<sup>15</sup> Some experience waiting times of up to four weeks, even though New Hampshire law requires a probable cause hearing within three days of an IEA.<sup>16</sup>

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*“Long wait times for psychiatric hospitalization is one visible symptom of a stressed mental health system.” New Hampshire 10-Year Mental Health Plan*

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*“The plaintiffs allege they and other persons who experience mental health crises are involuntarily detained in hospital emergency rooms, pursuant to an IEA petition and certificate, without counsel, a hearing, or any process for challenging the detention. They allege that the hospitals are not equipped to provide treatment while certified persons await admission to designated receiving facilities.” John Doe v. Commissioner of DHHS*

The Commissioner of the Department of Health and Human services filed a motion to dismiss the lawsuit, which was denied. On April 30, 2020, the Court (United States District Judge DiClerico) concluded that state law “does not provide any procedure for holding a person indefinitely pending delivery to a designated receiving facility...” and that when an IEA certificate is completed, the person must be provided a probable cause hearing within three days.<sup>17</sup> The lawsuit proceeds.

A similar case was filed on behalf of Jane Doe in Merrimack Superior Court claiming her rights to due process were denied while she waited in a hospital emergency room for an inpatient bed while in acute mental distress. The case has been accepted by the New Hampshire Supreme Court for briefing and argument in 2021. See *Jane Doe v. Commissioner*.

### **How Could People in NH Be Impacted?**

On November 12, 2020, there were approximately eighteen (18) children and thirty-nine (39) adults in acute mental health distress in New Hampshire waiting for admission to a designated receiving facility with an available inpatient treatment bed.<sup>18</sup> Most of these patients were waiting in hospital emergency departments, a situation that has persisted despite intensive efforts to implement the Community Mental Health Agreement in *Amanda D v. Hassan* and NH’s 10-Year Behavioral Health Plan.

The “ER Boarding” crisis has been exacerbated by the COVID-19 pandemic with professionals and patients reporting increasing rates of depression and anxiety in all communities across the state. Efforts to find sustainable solutions to support families in crisis is ongoing and impacted by the litigation outcome.

## STATE REGULATION OF PHARMACY BENEFIT MANAGERS

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### ***Rutledge v. Pharmaceutical Care Management (SCOTUS)***

In an important decision for states, the Supreme Court of the United States agreed the state of Arkansas could regulate the price of prescription drugs covered by Pharmacy Benefit Managers despite the broad preemption provisions of the Employment Retirement Income Security Act of 1974 (ERISA).<sup>19</sup> As the Court described, the Pharmacy Benefit Managers (PBMs) were “intermediaries between pharmacies and prescription drug plans” and the Arkansas law at issue regulated the reimbursement rate threshold. The PBMs claimed states could not interfere in their negotiations on behalf of health plans, claiming ERISA preempts state laws that “relate to” covered employee benefit plans.

The *Rutledge* decision is surprising given the *Gobeille v. Liberty Mutual* decision in 2016. In *Gobeille*, the Supreme Court, based on ERISA preemption, limited states’ ability to collect claims data for their All Payer Claims Databases (APCDs). APCDs are relied upon by public health departments, employers and researchers everywhere to predict and analyze the public’s health and health costs.

#### **How Could People in NH Be Impacted?**

The *Rutledge* case may pave the way for broader state-based regulation of health costs, prescription drug prices, and pharmacy benefit managers.

## ACCESS TO REPRODUCTIVE HEALTH

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Advocates opposing abortion rights have a number of cases pending that could result in a more direct challenge to *Roe v. Wade*, the 1973 ruling that established federal protection for a pregnant woman’s right to choose. As of June, there were at least 16 abortion cases before United States appeals courts, the last step before the Supreme Court.

With three new Supreme Court justices appointed during the Trump administration, it is unclear how the court will decide future cases about reproductive choice that make their way to SCOTUS.

### ***June Medical Services LLC v. Russo (SCOTUS)***

In *June Medical Services LLC v. Russo*,<sup>20</sup> the United States Supreme Court reviewed a Louisiana state law that limited access to reproductive health care by requiring expansive admitting privileges for doctors providing abortion services. Specifically, the law required that:

“every physician who performs or induces an abortion shall have active admitting privileges at a hospital that is located no further than thirty miles from the location at which the abortion is performed or induced.”<sup>21</sup>

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Several family planning clinics challenged the law in federal court, claiming the law would leave “thousands of Louisiana women with no practical means of obtaining a safe, legal abortion.” The case made its way to the United States Supreme Court.

In a 5-4 decision, the United States Supreme Court reversed the 5th Circuit Court of Appeals and struck down the Louisiana law as unconstitutional. Chief Justice Roberts, concurring in the judgment, agreed that the outcome was controlled by the Court’s earlier decision in *Whole Woman’s Health v. Hellerstedt*, where the Court held unconstitutional a “nearly identical” Texas law on the basis that the Texas law imposed an undue burden on a woman’s right to have an abortion.<sup>22</sup>

Advocates for choice, however, are concerned. The Chief Justice emphasized that despite his swing vote, he thought the prior case was perhaps wrongly decided, rejecting the balancing test set forth in *Whole Woman’s Health* requiring courts to weigh the asserted benefits of a law regulating abortion against the burdens it imposes on abortion access. Instead, he endorsed the standard that “[l]aws that do not pose a substantial obstacle to abortion access are permissible, so long as they are ‘reasonably related’ to a legitimate state interest.”

### **Planned Parenthood of Greater Texas v. Kauffman (5th Circuit)**

In a surprising development on November 23, 2020, the Fifth Circuit Court of Appeals ruled against Planned Parenthood patients in their suit against Texas for terminating the clinics participation in the Medicaid program. See *Planned Parenthood of Greater Texas v. Kauffman*. The clinics had successfully argued their removal from the Medicaid program by the Texas Health and Human Services Commission was unlawful under Medicaid’s “any qualified provider” provision bringing claims under 42 USC § 1983. But the 5th Circuit reversed the lower court and ruled their only remedy for termination as a provider was an administrative appeal process to the Commission. This decision is in direct conflict with a previous decision by the Fifth Circuit panel in *Planned Parenthood of Gulf Coast, Inc. v. Gee*, in which the court found Planned Parenthood and their patients did have a private cause of action under § 1983, paving the way for the conflict to be resolved at the United States Supreme Court.<sup>23</sup>

### **How Could People in NH Be Impacted?**

United States Supreme Court decisions defining a woman’s right to choose impact women and families everywhere, including New Hampshire. For decades, New Hampshire’s health care programs have ensured individuals have access to high quality reproductive, sexual and preventative health care services intended to help individuals maintain their sexual and reproductive health, determine if and when to have children, and prevent unintended pregnancy. Family planning services are available to all individuals at health care clinics across the state.

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## REFERENCES

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- 2 *King v. Burwell*, 576 U.S. 473.
- 3 *Texas v. United States*, 340 F.Supp.3d 579; See also *Texas v. United States*, 352 F.Supp.3d 665.
- 4 *CA v. TX*, Individual Respondents’ Brief in Opposition.
- 5 *Texas v. United States*, 945 F.3d 355.
- 6 Two states, Wisconsin and Maine, withdrew from the case in 2019.<sup>7</sup> Kaiser Family Foundation, Potential Impact of *California v. Texas* Decision on Key Provisions of the Affordable Care Act (Sept. 22, 2020).
- 8 *Amicus Brief of NH*
- 9 For more background and details on NH’s work and community engagement requirement, see [The Community Response to Medicaid Work and Community Engagement Requirements: Lessons from New Hampshire](#) (updated June 2020).
- 10 Previously, Medicaid applicants could request up to three months of retroactive coverage for healthcare services and expenses accrued prior to the application date.
- 11 NH Medicaid Enrollment Demographic Trends and Geography 2019; <https://www.dhhs.nh.gov/ombp/medicaid/documents/medicaid-enrollment-05012019.pdf>
- 12 *Philbrick v. Azar*, 397 F.Supp.3d 11.
- 13 Families First Corona Virus Response Act, Enhanced FMAP: <https://www.medicaid.gov/state-resource-center/downloads/covid-19-section-6008-faqs.pdf>
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- 21 Louisiana Act 620; La. R.S. § 40.1061.10(A)(2)(a).
- 22 See *Whole Women’s Health v. Hellerstedt*, 579 U.S. --- (2016).
- 23 <https://www.abajournal.com/news/article/en-banc-5th-circuit-allows-medicaid-defunding-of-planned-parenthood>