

Key Protections for America's Families Are at Risk: The Rushed Supreme Court Confirmation Is an Attack on Our Nation's Health

Following the recent death of Justice Ruth Bader Ginsburg, the rush to confirm President Trump's Supreme Court nominee puts our nation's health at grave risk. In the midst of the greatest public health crisis in at least a hundred years, the Supreme Court is poised to rule on a series of cases that could drastically reduce access to health care for tens of millions of people.

Most immediately, in early November the Court will hear oral arguments in *California vs. Texas*, a case that will decide the fate of the Affordable Care Act (ACA). With health care access in the balance for millions of families, this is the last step in an orchestrated challenge that threatens to strip away basic health care protections. It also is likely that the Court will rule on a series of consequential health care decisions regarding women's health services, the basic structure of the Medicaid program, immigrants' access to health care, and whether health care providers that receive federal funds can discriminate against LGBTQ people.

No one in this country should ever have to choose between going to the doctor and putting food on the table for their family or be forced to stay in a job just to keep their doctor. This Supreme Court nomination is an effort to subvert the wishes of the vast majority of Americans. It is likely to roll back basic health care protections for families that we should build on, not unravel.

A Stacked Court Jeopardizes Access to Health Care for Families Across America

This issue brief summarizes the critical health care issues that are expected or likely to come before the Court and the top five ways that a hasty Supreme Court nomination could lead to the Court stripping health care from families across America. With more than 1,000 people dying of COVID-19 every day in our country, these threats to our health and health care are even more devastating and immediate.

1. Overturning the Affordable Care Act

Before 2014, people with an illness or previous medical history — which is most of us, if we live long enough — were often unable to get health insurance in the United States. One in five Americans were underinsured, lacking basic access to doctors and the financial security that insurance provides. Among those who could buy insurance, many bought policies that seemed reputable — that they thought would cover them in a medical emergency — only to find these products had major loopholes and

exclusions and didn't cover fundamental services like hospitalizations injuries, or childbirth.

The ACA's patient protections changed all of those terrible dynamics for the better. More than 20 million people received coverage, and for the first time people in America — whether insured under the ACA or private insurance — gained the guarantee of affordable, comprehensive coverage regardless of whether they had pre-existing conditions. Despite this progress for America's families, Republican leadership repeatedly tried to undo the ACA's protections in Congress. When legislative measures failed, opponents sought to overturn the ACA in the courts. These efforts were narrowly — but repeatedly — stopped by the Supreme Court.

Now the composition of the Supreme Court is poised to change.

California vs. Texas, which the Supreme Court will hear on November 10, stems from the longstanding political effort to roll back popular ACA patient protections through litigation. Even conservatives deeply opposed to the ACA have described this lawsuit as “lawless”¹ and “an assault on the rule of law.”² With the death of Justice Ginsburg and the rushed confirmation of a new justice whom the President has vowed will oppose the health reform law, it is unlikely there will be enough votes on the Supreme Court to stop the ideological judicial campaign to overturn the ACA in whole or in part.

Additionally, if the Trump administration stays in office the Supreme Court is likely to be asked to rule on whether junk health care coverage such as “short-term plans” and “association health plans” can be marketed alongside plans that comply with ACA protections. These cases, now working their way

through the federal courts, seek to create a parallel insurance market that permits the sale of substandard coverage that circumvents the core protections of the ACA. Brokers and call centers selling junk “short-term plans” already confuse hundreds of thousands of consumers with offers of cut-rate coverage that provides little actual insurance value. This is a preview of a problem that will likely worsen if the Senate rushes the confirmation of the president's proposed justice.

2. Undermining Health Equity Protections

In June 2020, at the height of the COVID-19 pandemic, the U.S. Department of Health and Human Services issued a regulation that dismantles a range of protections against discrimination in health care.³ This rule puts in place even more barriers to care for those who are most vulnerable to COVID-19 infection and death, including LGBTQ people, and people with limited English proficiency. Two appellate courts have agreed that the Civil Rights Act includes protections for all people, regardless of whom they love. However, how this works in health care settings will likely remain the subject of litigation that is likely to reach the Supreme Court, particularly if the Trump administration remains in office and continues its effort to allow health care discrimination on the basis of language ability and sexual orientation.

3. Restricting Health Care for Immigrants and Essential Workers

Last year, the Trump administration finalized a new federal rule targeting access to health care for immigrants: the so-called “Public Charge” rule. Under this rule, if the Department of Homeland Security determines that an immigrant is likely to receive Medicaid — because they received Medicaid previously or for some other reason — that person may be denied lawful permanent residency or a visa.

This rule discriminates against immigrants whom our nation has welcomed for decades, who have followed the rules in applying for legal citizenship, and discourages them from getting the care and benefits they need to be healthy. With COVID-19 raging, millions of people who work in essential jobs — from picking the fruits and vegetables we eat to caring for aging parents and grandparents to putting their lives on the line to provide basic services we all need to stay healthy — are afraid to see a doctor because they might be deported or separated from their children.

Legal challenges to these rules will likely come before the Supreme Court in 2021 if President Trump is reelected.

4. Restricting Access to Reproductive Health and Family Planning Services

The highest-profile way in which the Supreme Court nomination puts women's health at risk is that the landmark abortion rights decision, *Roe vs. Wade*, could be overturned. That is not the most immediate threat, however. Increasingly, courts allow states to manipulate their authority to license health clinics, providing a way to close family planning clinics if they provide abortions alongside contraception and routine gynecological services. The Supreme Court partly blocked efforts to close family planning clinics in two five-to-four decisions in which Justice Ginsburg was one of five majority opinion votes.

States are also gaining permission from courts for the first time to deny Medicaid payments to family planning providers for non-abortion services if they provide abortions, even given that these providers fund abortion services with non-federal funds in accordance with the law. As a result, access to reproductive health has been deeply eroded at

the state level in multiple states with conservative governments and judges. This trend also takes away people's access to accurate information about different forms of family planning that they need to make the most personal decisions like when to start a family — a profound blow to human freedom.

5. Undermining Bedrock Medicaid Protections

Medicaid now provides health coverage for more than one in five American families, including about one-third of all children, half of pregnant women, most seniors in nursing homes, and tens of millions of low- and middle-income working people. But for Medicaid to work properly, it must provide some basic continuity of care and access to physicians and other health care providers. Both are at risk if the Senate rushes to confirm a Supreme Court nominee. These two risks are described below.

1. Paperwork Barriers to Medicaid Enrollment:

In an effort to undermine the ACA's expansion of Medicaid coverage to low-income working families, the Trump administration tried to enact new and onerous reporting requirements for work hours, volunteer community service, and other documentation, creating gratuitous bureaucratic barriers to coverage. Encouragingly, federal district and circuit court judges nominated by both major political parties have rejected these so-called work reporting requirements as illegal. The Supreme Court is now deciding whether to hear an appeal.

2. Access to Medicaid: The Social Security Act requires that Medicaid provide a level of access "available at least to the extent that comparable care and services are available to the general population." This requirement goes to the very heart of what health insurance is supposed to

do: give families affordable access to a robust network of providers for a wide range of health services. The question is whether courts will enforce these requirements. The Supreme Court ruled in 2015 that providers cannot sue in court to enforce them. It is still to be determined, given the narrow split in the 2015 Supreme Court decision, whether individual Medicaid beneficiaries can sue when states fail to provide them basic health care access. It is also questionable whether the federal Centers for Medicare and Medicaid Services can or will enforce standards to give 70 million Medicaid beneficiaries access to “care and services comparable” to other insurance products. Both Congress and the Supreme Court will likely play significant roles in addressing this critical question.

Conclusion

The daunting health care issues pending before the Supreme Court and those likely to come before it in the near term will have great consequence for every individual and family in America. Taken together, these threats to our health and health care could take away protections at the very moment when we need them most. If we have learned anything from the COVID-19 pandemic, it is that viruses don’t care where someone comes from or how much they earn. If any of us is sick, all of us can become sick. We all should have access to affordable health care, regardless of who we are, our wealth, or our immigration status. That basic principle is at stake — and at grave risk — in the Supreme Court and could have harmful consequences for the health of our families and communities.

Endnotes

¹ <https://www.nytimes.com/2018/12/15/opinion/obamacare-ruling-unconstitutional-affordable-care-act.html>.

² <https://www.washingtonexaminer.com/opinion/i-hate-obamacare-but-texas-judges-decision-on-its-unconstitutionality-is-an-assault-on-the-rule-of-law>.

³ <https://www.hhs.gov/about/news/2020/06/12/hhs-finalizes-rule-section-1557-protecting-civil-rights-healthcare.html>.

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